Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

JOHN RICHARDS, as Conservator and Guardian of Leonard Richards,

Petitioner,

versus

MICHELIN TIRE CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER, IN A DIVERSITY CASE, A FEDERAL COURT OF APPEALS VIOLATES THE *ERIE* DOCTRINE BY REVERSING A PUNITIVE DAMAGES VERDICT SOLELY BECAUSE THE COURT BELIEVES THAT THE SUBSTANTIVE LAW OF THE FORUM STATE MAKES IT TOO EASY TO RECOVER PUNITIVE DAMAGES?

WHETHER THE ELEVENTH CIRCUIT VIOLATED THE TENTH AMENDMENT AND THE *ERIE* DOCTRINE WHEN IT SUPPLANTED WELL-SETTLED ALABAMA PRODUCTS LIABILITY LAW WITH ITS OWN PHILOSOPHY CONCERNING WHEN PUNITIVE DAMAGES SHOULD BE RECOVERABLE?

PARTIES TO THE PROCEEDING

The petitioner in this proceeding is John Richards, as conservator and guardian of Leonard Richards, an adult and legally incompetent citizen of Alabama. Mr. Richards was the appellee in the Eleventh Circuit and is hereinafter referred to as "Mr. Richards."

The respondent in this proceeding is Michelin Tire Corporation, the appellant in the court below.

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MICHELIN TIRE CORPORATION,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Mr. John Richards petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the panel for the Eleventh Circuit is officially reported at 21 F.3d 1048 (11th Cir. 1994) and is reprinted in the Appendices at 1a-24a. The Eleventh Circuit's denial of Mr. Richards' application for rehearing *en banc* is not reported, but is reprinted in the Appendices at

25a-26a. The judgment of the United States District Court for the Southern District of Alabama and its denial of respondent's post-judgment motions (for JNOV and a new trial) are not reported, but are reprinted in the Appendices at 27a-28a and 29a-30a, respectively.

GROUNDS FOR JURISDICTION

The judgment of the panel for the Eleventh Circuit was entered on May 31, 1994. A timely petition for rehearing *en banc* was filed on June 21, 1994. The petition for rehearing was denied on August 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1) (1993).

CONTROLLING CONSTITUTIONAL PROVISION AND STATUTE

The Tenth Amendment of the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

U.S. Const. amend. X. The Rules of Decision Act also applies to this petition:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil

actions in the courts of the United States, in cases where they apply."

28 U.S.C.A. § 1652 (1994).

STATEMENT OF THE CASE

I. Course Of Proceedings Below

On May 5, 1987, thirty-year old Leonard Richards ("Leonard") suffered devastating injuries when a 16-inch Michelin tire violently exploded in his face.[1] App. at 4a-5a. Leonard's father, Mr. John Richards, brought a products liability action in an Alabama court against the respondent, Michelin Tire Corporation ("Michelin"). App. at 2a. Mr. Richards alleged that, under Alabama law, Michelin negligently and wantonly failed to warn users about the extremely dangerous and subtle "mismatch" problem which caused Leonard's injury and that Michelin negligently and wantonly failed to use a proven design alternative which would have eliminated the dangers associated with mismatches.[2] App. at 6a. The complaint

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[1] In the explosion, Leonard's head was severely crushed (causing severe, permanent brain damage). Leonard also lost an eye, a finger and suffered a broken arm. For the last seven years, Leonard has been lying in a chronic vegetative state in a nursing home in Grand Bay, Alabama. He is expected to remain there for the remainder of his projected life, which is the year 2016.

[2] The complaint also included the rim manufacturer, the Budd Company ("Budd"), and the Ford Motor Company ("Ford"), whom Michelin claimed had approved the language which appeared on the sidewall of its tires. App. at 6a. Ford and Budd both settled with Mr. Richards upon payment of $1 million each prior to trial. App. at 6a.

sought both compensatory damages and punitive damages.[3]

Michelin removed the case to federal court on the basis of diversity jurisdiction. App. at 6a. After a two week trial, the jury found in favor of Mr. Richards on both the negligence and wantonness counts. The district court then entered judgment against Michelin for $161,475 in compensatory damages[4] and $3 million in punitive damages and denied Michelin's motions for JNOV and new trial. App. at 6a-7a. Michelin appealed. App. at 7a. On appeal, the Eleventh Circuit reversed the district court's judgment on the wantonness claims and remanded the case for a new trial on the negligence claims. App. at 24a.

II. The Evidence Submitted At Trial

A. The Hazard

The sequence of events leading to Leonard's tragedy are commonly known as "a tire/rim mismatch." App. at 2a. A tire/rim mismatch occurs when a tire mounter mistakenly attempts to mount a 16-inch tire onto a 16.5-

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[3] Punitive damages are recoverable under Alabama law upon proof of wantonness. Wantonness is defined by statute in Alabama as follows: "Conduct which is carried on with a reckless or conscious disregard of the rights or safety of others." Ala. Code § 6-11-20(b)(3) (1993).

[4] The trial court instructed the jury that, due to his chronic vegetative state, Leonard could not recover damages for pain and suffering. Hence, the compensatory award consisted of lost wages only.

inch rim. App. at 2a. The mistake occurs in part because the 16-inch rim is actually *wider* than the 16.5-inch rim, causing tire mounters to think that the smaller rim is the 16-inch rim, when it is, in fact, the 16.5-inch rim. Unfortunately, a tire mounter is typically unaware of his mistake until it is too late – after he has inflated the mismatched tire to pressures sufficient to allow the whole tire and wheel assembly to violently explode. Although Leonard was a simple farm hand, mismatches have occurred to engineers at a Ford testing facility. [R7-152].

B. The Industry's Awareness

At trial, the *undisputed* evidence established that as early as 1975, the tire and rim industry was well aware of the dangers of mismatches and the serious injuries and deaths they were causing. App. at 3a. In fact, the industry distributed graphic warnings illustrating the danger of mismatches in its primary trade journal. App. at 3a. Unfortunately, however, this trade journal seldom made its way into the hands of the actual tire mounters (like Leonard).

C. Michelin's Awareness And Its Failure To Warn

Additionally, at trial, Michelin representatives admitted that Michelin knew of the dangers of tire/rim mismatches in 1976. App. at 3a. Moreover, Michelin was actually sued *four* times for mismatch accidents *before* it manufactured (in 1985) the tire which caused Leonard's injury. App. at 22a. In 1982, after Michelin had already been sued *three* times for mismatch injuries, Ford, who bought 16-inch tires from Michelin to put on its new trucks, specifically *demanded* in writing that all of its tire

suppliers (including Michelin) emboss warnings regarding the dangers of mismatches into the sidewalls of their 16-inch tires. App. at 3a. Unlike nearly every other tire supplier, Michelin rejected Ford's demand "point blank." [R7-705-06]. Michelin refused to emboss a warning into its tires because it was worried that a warning might start "a dangerous legal precedent" for its then-existing lawsuits.[5] App. at 3a. Instead, Michelin convinced Ford to allow it to place only the following *instruction* on its tires' sidewalls: "Mount only on approved 16-inch rim."[6] App. at 4a. Although Ford acquiesced in Michelin's proposed compromise out of deference to Michelin's expertise, Ford advised Michelin that it would bear legal responsibility for the language that it chose. [Plf's Ex. 39F & 39I]. Even though it promised Ford it would do so, Michelin never included any warning language (even the

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[5] Sid Bloor, Michelin's Vice-President and Technical Advisor on Product Performance, admitted that he denied Ford's request "point blank" "[b]ecause Michelin does not want to start a dangerous legal precedent." [R7-705-06; Plf's Ex. 39C].

[6] Although the Eleventh Circuit categorized the language placed on the tires as a "warning," the undisputed evidence established that it was nothing more than an "instruction." Michelin's Vice-President in charge of Product Safety admitted that the language was not a warning. [R7-195-99]. Additionally, Mr. Richards' warnings expert testified, without contradiction, that Michelin's instruction was "not a warning by any definition of a warning." [R9-478]. Mr. Richards' expert explained that a warning concerns safety information, but that Michelin's language was only an instruction because it did not convey any information about safety, [R9-479-80], and stated that the language Michelin used is not a warning because "there is no implication that there is a safety problem involved or an injury potential." [R9-490].

above instruction) in any of its product literature. App. at 4a.

D. Michelin's Failure To Employ A Design Alternative

In addition to failing to warn, the evidence established that a proven design alternative existed which would have eliminated the mismatch hazard altogether. App. at 17a n.17. This alternative design consisted of using stronger "bead wires" in the bead area of the tire. *Id.* The bead area is the inner circumference of a tire which rests on the metal rim when mounted. This is the part of the tire which fails (explodes) under pressure in mismatch scenarios. *Id.* The design alternative consisted simply of a stronger bead wire which would withstand inflated pressure in excess of 200 pounds (the limits of most air compressors) without exploding.[7] *Id.* Accordingly, in the event of a mismatch, no explosion occurs when tires are inflated to foreseeable pressures. *Id.* Michelin was using this alternative design in its other 16-inch

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[7] In Leonard's case, he had inflated the tire to 70 to 75 p.s.i. when the tire exploded. App. at 5a. The testimony at trial indicated that the tire was designed to withstand pressure in excess of 80 p.s.i. under normal operating conditions (such as hot road conditions). [R119-120]. Although the tire sidewall indicated that the tire was rated for 65 p.s.i., the sidewall did not indicate the maximum pressure when the tire was not under a load (i.e., while it was being mounted). App. at 4a-5a n.5.

tires, but not the 16-inch tire which caused Leonard's injury.[8] *Id.*

E. The Gravity Of The Mismatch Problem

The serious injuries caused by tire/rim mismatches have become a national problem. "Hundreds, perhaps, thousands, of innocent people have been injured or killed by the explosion of a tire being mounted on a wheel of a pickup truck or similar vehicle." Edwards & Edwards, Tires and Rims, Defect, Not Mismatch, *Trial*, May, 1992, at 60; *Exploding Tire Case May Affect Punitive Damages Law*, Fulton County Daily Report, November 19, 1993, at 1, 2 ("400 to 500 mismatch suits have been filed nationwide, with perhaps 30 to 50 of them pending in the three states covered by the Eleventh Circuit: Florida, Georgia, and Alabama"). At least fourteen courts have already rendered opinions in mismatch cases.[9]

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[8] At least one of Michelin's competitors, Goodyear Tire Company, began using the stronger bead wire technology regularly in its 16-inch tires in 1985 in order to limit the number of tragedies resulting from tire/rim mismatches. App. at 17a n.17.

[9] *See Palmieri v. Chevrolet Motors Div. General Motors Corp.*, No. 84-3917 (Dec. 25, 1985 N.D. Ohio), *aff'd mem.*, 782 F.2d 1043 (6th Cir. 1985) (16-inch Goodrich tire mismatched on a 16.5-inch Kelsey Hayes rim); *Giddens v. Denman Rubber Mfg. Co.*, 440 So. 2d 1320 (Fla. Ct. App. 1983) (16-inch tire mismatched on 16.5-inch rim); *Brantley v. General Motors Corp.*, 573 So. 2d 1288 (La. Ct. App.), *writ denied*, 577 So. 2d 17 (La. 1991) (16-inch Universal Cooperative tire mismatched on 16.5-inch Kelsey-Hayes rim); *Mobley v. General Motors Corp.*, 482 So. 2d 1056 (La. Ct. App.), *writ denied*, 486 So. 2d 735 (La. 1986) (16-inch Uniroyal tire on 16.5-inch Kelsey-Hayes rim); *Jones v. P.K. Smith Chevrolet-Olds, Inc.*, 444 So. 2d 1372 (La. Ct. App. 1984) (16-inch Firestone tire

III. The Eleventh Circuit's Ruling vs. The Law Of The Forum State

A careful reading of the Eleventh Circuit's opinion illustrates that the court was more concerned with whether Mr. Richards should recover punitive damages than whether he submitted sufficient evidence to satisfy the underlying state substantive law which allows the recovery of those punitive damages. The Eleventh Circuit apparently objected to the fact that Alabama law allows Michelin to be punished for the conduct Mr. Richards proved at trial. The only way to prevent that punishment, however, was to find insufficient evidence of wantonness. To accomplish this, the court ignored indistinguishable Alabama precedent and created several factual defenses

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mismatched with 16.5-inch rim); *Vannoy v. Uniroyal Tire Co.*, 111 Idaho 536, 726 P.2d 648 (Idaho 1985) (16-inch Uniroyal tire on 16.5-inch Kelsey-Hayes rim); *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145 (Ind. Ct. App. 1990) (16-inch Firestone tire on an undisclosed 16.5-inch rim); *Mazikoske v. Firestone Tire & Rubber Co.*, 149 Ill. App. 3d 166, 500 N.E.2d 622 (1986) (16-inch Firestone tire on 16.5-inch Kelsey-Hayes rim); *Kohn v. La Manufacture Franchise Des Pneumatiques Michelin*, 476 N.W.2d 184 (Minn. Ct. App. 1991) (16-inch Michelin tire mismatched on an undisclosed 16.5-inch rim); *Priefer v. Michelin Tire Corp.*, 1990 WL 68624 (Minn. Ct. App. 1990) (16-inch Michelin tire mismatched on a 16.5-inch Budd rim); *Sundin v. Kelsey-Hayes Co.*, 1988 WL 2711 (Minn. Ct. App. 1988) (16-inch Firestone tire mismatched on a 16.5-inch Kelsey-Hayes rim); *Petrie v. B.F. Goodrich Co.*, 572 N.Y.S.2d 595, 175 A.D.2d 669 (N.Y. App. Div. 1991) (16-inch tire on a 16.5-inch rim); *Beasock v. Dioguardi Enterprises, Inc.*, 499 N.Y.S.2d 558, 117 A.D.2d 1015 (N.Y. App. Div. 1986) (16-inch General tire mismatched on a 16.5-inch Kelsey-Hayes rim); *Wheeler v. General Tire & Rubber Co.*, 142 Wis. 2d 798, 419 N.W.2d 331 (1987) (16-inch General tire mismatched on a 16.5-inch Kelsey-Hayes rim).

to punitive damages which do not exist under Alabama law.

For example, the Alabama Supreme Court has stated that the following is sufficient evidence to prove wantonness in a failure to warn case:

> "The plaintiffs presented evidence that the dangers of carbon monoxide poisoning from gas appliances had been *generally known in the industry* at the time the water heater was designed; that [defendants] had designed, manufactured, marketed, and distributed the . . . water heater to be installed by consumers; that *[defendants] were actually aware that consumers were misinstalling gas water heaters* by connecting them to LP gas and by failing to vent them properly; that *[defendants] were actually aware that such improper installation had caused deaths* and injuries from carbon monoxide poisoning; that *a wrongful death action* based on carbon monoxide poisoning caused by connection of a Kenmore II gas water heater to LP gas *had been filed against [defendants] in 1981*; and that notwithstanding knowledge of these facts, [defendants] did not place *any additional warning or instruction* labels on the water heater or otherwise alter its design."

Sears & Roebuck Co. v. Harris, 603 So. 2d 1018, 1032 (Ala. 1994) (emphasis added). Ironically, Mr. Richards proved all of this *and more* in the instant case. Here, the evidence established that the industry was aware of the mismatch problem, that Michelin was aware of the mismatch problem, that Michelin had been sued *not once but four times* prior to making the subject tire, and that Michelin received a *direct demand* for a warning from Ford.

In short, if Mr. Richards had been able to avoid diversity jurisdiction, his verdict would have been affirmed by the Alabama Supreme Court.[10] For a graphic illustration of how the evidence submitted in the present case met the standard set forth in the *Sears* case see the chart on page 18, *infra*.

On application for rehearing, Mr. Richards challenged the court's decision under the *Erie* doctrine. The Eleventh Circuit, however, denied Mr. Richards' application for rehearing without opinion. App. at 25a-26a.

SUMMARY OF THE ARGUMENT

Under the *Erie* doctrine, a federal court sitting in diversity must apply the substantive law of the state in which it sits. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1937). This Court recently stated: "The *Erie* rule remains a vital expression of the federal system and the concomitant integrity of the separate States." *Ferens v. John Deere Co.*, 494 U.S. 516, 524 (1990). In this case, however, the

[10] Oddly, although the standard of review requires the court to view the evidence in the light most favorable to Mr. Richards, the court discussed *Michelin's* evidence with particulars, while reducing Mr. Richards' best evidence to footnotes. For examples of the court's biased treatment of the evidence see App. at 17a n.17 and accompanying text; App. at 22a n.20 and accompanying text; App. at 23a n.22 and accompanying text; App. at 24a n.23 and accompanying text. Incredibly, the court relied on findings of the National Highway Traffic Safety Administration ("NHTSA") which were promulgated in 1991 – 9 years *after* Ford demanded mismatch warnings and 4 years *after* the subject accident. App. at 3a n.3.

Eleventh Circuit impermissibly " 'brush[ed] aside the law of a State in conflict with [its] views.' " *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1937) (quoting *Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)). In essence, the court supplanted Alabama law with its own philosophy regarding products liability cases and punitive damage awards.

The claims for wanton design and failure to warn are firmly settled areas of Alabama law. Under *Erie*, the *Richards* court was obligated to examine the jury's verdict strictly in light of Alabama substantive law. *See, e.g., Mercer v. Theriot*, 377 U.S. 152 (1964); *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956); *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208 (1939); *Hudson v. Moonier*, 304 U.S. 397 (1938); *Rosenthal v. New York Life Ins. Co.*, 304 U.S. 263 (1938); *New York Life Ins. Co. v. Jackson*, 304 U.S. 261 (1938); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1937). The court, however, unconstitutionally supplanted Alabama law with its own views. The court's decision is a direct threat to the autonomy states are guaranteed by the United States Constitution. Without forceful repudiation from this Court, the Eleventh Circuit, and all federal courts of appeals sitting in diversity, may disregard the law of their forum states with impunity. Mr. Richards therefore respectfully requests this Court to grant his petition for writ of certiorari in order to revive the special and important protections the *Erie* doctrine guarantees the states and their citizens.

Mr. Richards acknowledges that this Court grants only a small number of petitions and that the federal courts of appeals are typically the courts of last resort for most litigants, especially in diversity cases. *See Dick v.*

New York Life Ins. Co., 359 U.S. 437, 461 (1959) (Frankfurter, J., dissenting). Mr. Richards appreciates the fact that this Court has gradually moved away from granting petitions which merely concern whether a court of appeals properly applied state law. However, from time to time, the Court should accept a case which raises an *Erie* challenge to ensure that the lower federal courts remain accountable to the Constitution, the decisions of this Court, and the laws of the forum states in which they sit. Without meaningful supervision by this Court, the federal courts of appeals are free to administer the law according to their own philosophies and to ignore controlling law without any fear of reproval. Given the number of tire/rim mismatch cases pending nationwide, the instant case is an ideal opportunity for this Court to assert its supervisory authority.

The Eleventh Circuit's standard for the recovery of punitive damages in Alabama products liability cases directly contravenes the policies of *Erie* because the same evidence yields diametrically different outcomes in state and federal court. The Eleventh Circuit's holding will ensure that future Alabama product liability defendants will make every effort to remove cases to federal court where they are subjected to more favorable standards on punitive damages claims. By ignoring the law of the forum state, the Eleventh Circuit has "departed from the accepted and usual course of judicial proceedings, . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a). For these reasons, Mr. Richards petitions the Court to review the judgment of the Eleventh Circuit.

REASONS FOR GRANTING THIS PETITION

THE ELEVENTH CIRCUIT VIOLATED THE *ERIE* DOCTRINE BY SUPPLANTING ALABAMA LAW WITH ITS OWN VIEWS ABOUT PUNITIVE DAMAGES

In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1937), this Court held that federal courts sitting in diversity *must* apply the law of the State in which it sits. *Erie*, 304 U.S. at 78. This Court explained:

> " '[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. *Any* interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.' "

Id. at 78-79 (emphasis added) (quoting *Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)). The principles espoused in *Erie* were deemed so vital to our system of federalism that they moved Justice Holmes to say that " *'no lapse of time or respectable array of opinion should make us hesitate to correct'* " . . . " 'an unconstitutional assumption of powers by courts of the United States.' " *Id.* at 78-79 (emphasis added) (quoting *Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

The *Erie* doctrine "expressed a policy that touches vitally the proper distribution of judicial power between State and

federal courts." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). "In essence, the intent of [the *Erie* doctrine] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, *the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.*" *Id.* at 109 (emphasis added). In *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court noted: "The *Erie* rule is rooted in part in a realization that it would be unfair for character or result of a litigation materially to differ because the suit had been brought in a federal court." *Hanna*, 380 U.S. at 467. Hence, the outcome-determinative test must be read with "reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[11] *Id.* at 468.

In short, federal courts sitting in diversity may not substitute their own philosophical preferences for that of the substantive law of the forum state. In this case, however, the Eleventh Circuit violated this principle: (1) by creating a new defense for punitive claims for failure to warn (i.e., the "steps to warn" defense), (2) by creating a "statistical probability" defense for large product manufacturers, and (3) by creating a new element for improper

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[11] As two commentators explained: "The Erie Court did not intend to preclude forum-shopping for purposes of efficiency, strategic advantage, or reduced cost – *Erie*'s target was *forum-shopping for a result based upon differences in the applicable substantive law*, since the decision sought to prevent 'inequitable administration of the laws.' " Darrell N. Braman & Mark D. Neumann, *The Still Unrepressed Myth of* Erie, 18 U. Balt. L. Rev. 403, 413 (1989) (emphasis added).

design claims against product manufacturers. Each is discussed below.

I. THE COURT VIOLATED *ERIE* BY HOLDING THAT "TAKING SOME STEPS TO WARN" PRECLUDES A FINDING OF WANTONNESS IN ALABAMA

In its opinion, the Eleventh Circuit stated:

> "*We* have repeatedly held that the issue of punitive damages should not go to the jury when a manufacturer takes steps to warn the plaintiff of the potential danger that injured him; such acts bar a finding of wantonness."

App. at 22a (emphasis added).[12] Alabama has *never* espoused the idea that taking "some steps" to warn precludes a finding of wantonness. To the contrary, the Alabama Supreme Court just last year held a manufacturer liable for wantonness, *even though it had taken extensive steps to warn.*[13] *Sears Roebuck & Co. v. Harris*, 630 So. 2d

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[12] The instant case is the third in a line of cases where the Eleventh Circuit has rejected Alabama's substantive law concerning wantonness. *See Toole v. McClintock*, 999 F.2d 1430 (11th Cir. 1993); *Rommell v. Automobile Racing Club of American, Inc.*, 964 F.2d 1090 (11th Cir. 1992). This trilogy directly contradicts Alabama state law regarding wantonness and, therefore, is a form of federal common law. Each case relies, one upon the other, for precedential weight. However, the genesis of these wantonness rulings was a case from Texas, *Krister v. Beech Aircraft Corp.*, 479 F.2d 1089 (5th Cir. 1973), which has requirements far different for wantonness than Alabama.

[13] In Sears, labels were affixed onto the heater containing warnings and instructions regarding how far the heater should

1018, 1033 (Ala. 1993). In the instant case, even if one accepts the Eleventh Circuit's erroneous conclusion that the words "Mount only on approved 16-inch rims" constitute a "warning," Mr. Richards still presented sufficient evidence under Alabama law to create a jury question on wantonness.[14] The following chart graphically illustrates how the evidence submitted in this case meets and surpasses Alabama's substantive standard of wantonness:

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be from the walls and how to light the pilot light. *Sears*, 630 So. 2d at 1021. The labels, however, did not "warn[] of the dangers of carbon monoxide poisoning or explain[] the necessity of venting the water heater," nor did it "specifically inform[] the consumer that the water heater was to be used only with natural gas, and, consequently, not with liquid propane gas." *Id.* at 1023.

[14] Another case which holds that a defendant can be liable for failure to warn even though it took steps to warn is *Bean v. BIC Corp.*, 597 So. 2d 1350 (Ala. 1992). In *Bean*, the trial court granted summary judgment in favor of defendant on the ground that defendant submitted an affidavit "which stated, in pertinent part, that 'the lighters have always been sold in packages which contain the following warnings, among others: 'KEEP OUT OF REACH OF CHILDREN' and 'KEEP AWAY FROM CHILDREN.' " *Bean*, 597 So. 2d at 1353. Reversing the summary judgment, the Alabama Supreme Court explained that a genuine issue of material fact existed as to whether the warning adequately apprised plaintiffs of the danger. *Id.* "The Beans do not contend that there was no warning, but rather that the warnings given did not adequately apprise them that small children would be attracted to the lighter and that it could be easily operated by small children." *Id.*

THE EVIDENCE IN SEARS	*vs.*	THE EVIDENCE IN THIS CASE
1. Industry aware of danger when product designed.		1. Tire/rim industry aware of mismatch danger 10 years before making subject tire.
2. Defendant Sears actually aware of danger presented by its product.		2. Michelin actually aware of mismatch problem 9 years before making subject tire.
3. Defendant Sears actually aware that the danger had caused deaths and injuries.		3. Michelin actually aware that mismatches had caused deaths and injuries.
4. Defendant Sears had been sued for the product defect *once* prior to making the subject product.		4. Michelin had been sued *four* times before making the subject tire.
5. Defendant Sears failed to warn.		5. Even after Ford demanded it, Michelin refused to warn for fear of setting a "dangerous legal precedent".
6. Defendant Sears did not alter its design.		6. Michelin refused to alter its design.

As the above chart illustrates, Mr. Richards easily satisfied Alabama's test for wantonness. The Eleventh Circuit's "decision should have been made according to the applicable principles of the state law." *New York Life Ins. Co. v. Jackson*, 304 U.S. 261, 262 (1937) (citing *Erie*). The Eleventh Circuit was not free to reject Alabama substantive law.

II. THE COURT VIOLATED *ERIE* BY INVENTING A "STATISTICAL PROBABILITY" TEST FOR WANTONNESS IN ALABAMA

In its opinion, the Eleventh Circuit also *created* a "statistical probability" test which does not exist in Alabama. In its opinion, the court held:

> "Contrary to Richards' assertions, notice of prior injuries does not automatically create a jury question on wantonness. *Toole*, 999 F.2d at 1435; *Rommell v. Automobile Racing Club of Am., Inc.*, 964 F.2d 1090, 1096-98 (11th Cir. 1992); *see also Benford v. Richards Med. Co.*, 792 F.2d 1537, 1538-39 (11th Cir. 1986) (defendant not wanton despite knowing of the potential dangers of using steel in manufacturing hip prosthesis). In *Toole*, we reversed an award of punitive damages, holding that because the likelihood that silicone gel breast implants would rupture during surgery was less than one percent, such harm cannot be considered a "likely" event. 999 F.2d at 1435. Similarly, in *Rommell*, we held that the defendant racing association's knowledge of pit fires did not create a jury question as to whether the defendant was wanton in failing to provide pit crews with non-flammable clothing.

> 964 F.2d at 1096-98. Here, the evidence demonstrated that the actual incidence of mismatches was roughly one in millions and that Appellant knew of only four other mismatch incidents. Had Appellant been aware of a greater number of mismatch accidents, we may well have reached a different conclusion. However, based on this record, it cannot be said that mismatch explosions are likely or that the failure to warn Richards of the risks of mismatches made such explosions likely."

App. at 21a-22a. Alabama does *not* utilize a "statistical probability" test for wantonness. To the contrary, Alabama's Pattern Jury Instructions for wantonness states:

> "Wantonness is the conscious doing of some act or omission of some duty under knowledge of existing conditions and conscious that from the doing of such act or omission of such duty *an injury* will likely or probably result."

APJI 29.00 (emphasis added).[15] The Alabama Supreme Court has found sufficient evidence of wantonness without regard to any "statistical probability" of injury in a number of cases.

For example, in *Savage Industries, Inc. v. Duke*, 598 So. 2d 856 (Ala. 1992), the Alabama Supreme Court upheld a finding of wantonness against the manufacturer of a youth model shotgun which discharged when a boy dropped it. *Duke*, 598 So. 2d 859. The court affirmed despite the manufacturer's knowledge of only *two* previous accidents. *Id.* The court's opinion *never refers* to the

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[15] This is the language used by the district court in charging the jury. [R13-1434].

number of youth models sold relative to the number of accidents of which Savage was aware. Additionally, in *Sears, supra,* the Alabama Supreme Court upheld a finding of wantonness where the defendant had only been sued *one* time prior to the plaintiff's suit. In *Mead Coated Board, Inc. v. Dempsey,* No. 1921827, 1994 WL 154660 (Ala. April 29, 1994), the court upheld a finding of wantonness based solely on the testimony regarding safer unloading procedures from the defendant's yard supervisor. *Dempsey,* 1994 WL 154660, at *2. The Alabama Supreme Court held: "On this evidence, a jury could reasonably conclude that Mead had the degree of consciousness of probability of injury required to prove wantonness." *Id.* at *2. In short, the *Mead* court affirmed despite a complete lack of prior accidents or *any* empirical evidence of knowledge of risk by Mead.

Thus, an Alabama plaintiff does not have to meet a "statistical probability" test in order to succeed on a wantonness claim. Instead, in Alabama, the jury is free to *infer* wantonness from all the facts and circumstances. Now, however, under the Eleventh Circuit's new "statistical probability" rationale,[16] no matter how aware a

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[16] Curiously, an earlier and different panel for the Eleventh Circuit recognized that Alabama does not require knowledge of *any* prior incidents to prove wantonness. *Lakeman v. Otis Elevator,* 930 F.2d 1547 (11th Cir. 1991) (Tuttle, Anderson, and Clark, JJ.). In *Lakeman,* the court held: "While the Alabama Supreme Court has held that knowledge of prior accidents is sufficient to support a finding of wantonness, *we are unaware of any decision in which it has held that knowledge of a prior accident is required.*" *Lakeman,* 930 F.2d at 1553 (emphasis added). In *Lakeman,* there was *no* evidence of any prior accidents or injuries, yet the punitive damages verdict was affirmed. In his briefs to the Eleventh

manufacturer is of the fact that its product is dangerous to its users, the greater the number of the dangerous products it can sell, the less it will have to worry about liability for wantonness or punitive damages.[17] Here, Michelin knew of the hazards of tire/rim mismatches for *eleven years* prior to Leonard's accident, and it was sued *four times* before it manufactured the tire which caused Leonard's injury. Alabama does not allow a manufacturer who knows that his product will likely cause injury to avoid liability by selling *more* of his product in order to dilute the sale/injury ratio. Therefore, the Eleventh Circuit's creation of a "statistical probability" test was a direct violation of the Tenth Amendment and the *Erie* doctrine.

Circuit, Mr. Richards quoted *Lakeman* extensively. Unfortunately, this irreconcilable opinion was flatly ignored by the court in this case. The court's treatment of *Lakeman* is merely additional evidence of the court's result-driven handling of the verdict in this appeal.

[17] Interestingly, the Eleventh Circuit itself proclaimed that knowledge of *more* mismatches "may well have" caused a different conclusion in this case. App. at 22a. The Eleventh Circuit's decision, however, begs the question: Would the court have considered 5 deaths or injuries sufficient? 15? 50? Even if 15,000 people had been killed, the incidence of injury would be only one in a 1000. Is this enough before liability for wanton misconduct would attach under the Eleventh Circuit's decision?

III. THE COURT VIOLATED *ERIE* BY ADDING THE ELEMENT OF "GREATER OVERALL SAFETY" TO DESIGN DEFECT CASES IN ALABAMA

After quoting Alabama law regarding design defect claims, App. at 16a, the Eleventh Circuit stated that the second element of a design defect claim "requires Richards to show that the alternative design was of *greater overall safety* than the design actually used." App. at 16a (emphasis added). Once again, the court disingenuously created a requirement where none exists under Alabama law. In Alabama, proof of a design defect claim simply requires the jury to weigh "the utility of the alternative design" against "the utility of the design actually used." *Beech v. Outboard Marine Corp.*, 584 So. 2d 447, 450 (Ala. 1991). No Alabama cases have articulated any standard of "greater overall safety." Under a design claim in Alabama, a plaintiff must simply show that an alternative design was available and practical and would have prevented the injury in question. *Beech*, 584 So. 2d at 450.

Here, of course, Mr. Richards met this burden by showing that Michelin *itself* used the alternative design in some of its higher range 16-inch tires prior to the manufacturer of the 16-inch tire in question. App. at 17a n.17. Mr. Richards also proved that Goodyear employed the alternative bead design technology in its 16-inch tire beginning in 1985 – the same year the subject tire was manufactured. *Id.* In short, Mr. Richards proved what was required to sustain a design claim.

CONCLUSION

The Eleventh Circuit was obligated to examine the district court's judgment strictly in light of Alabama's substantive law. In failing to do so, the court violated the *Erie* doctrine and undermined the vital federalist principles upon which it was founded. Its opinion will not only ensure forum shopping on a critical outcome-determination issue (punitive damages), but it serves as erroneous precedent for other courts confronted with mismatch cases. For these reasons, the Court should grant the petition.

Respectfully submitted,

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John RICHARDS, as Conservator, etc., Plaintiff-Appellee,

v.

MICHELIN TIRE CORP., Defendant-Appellant,

The Budd Company; Ford Motor Co., Defendants.

No. 92-6547.

United States Court of Appeals, Eleventh Circuit.

May 31, 1994.

Conservator and guardian of estate of worker brought suit against tire manufacturer for injuries sustained by worker from explosion of tire that worker was attempting to mount on mismatched rim. The United States District Court for the Southern District of Alabama, No. 88-1022-P-C, Virgil Pittman, J., awarded compensatory and punitive damages, and manufacturer appealed. The Court of Appeals, Johnson, Senior Circuit Judge, held that: (1) insufficient evidence supported negligent design claim; (2) insufficient evidence supported wanton design claim; and (3) insufficient evidence supported wanton failure to warn claim.

Judgment vacated, motions granted in part, and case remanded.

Appeal from the United States District Court for the Southern District of Alabama.

Before BLACK, Circuit Judge, and JOHNSON and HENDERSON, Senior Circuit Judges.

JOHNSON, Senior Circuit Judge:

Plaintiff-Appellee John Richards, as conservator and guardian of the estate of Leonard Richards,[1] brought this action against Michelin Tire Corporation ("Appellant") for injuries sustained from the explosion of a 16-inch Michelin tire that Richards was attempting to mount onto a 16.5-inch rim. A jury awarded $161,475 in compensatory damages and $5,000,000 in punitive damages. Appellant appeals the district court's denial of its motion for judgment as a matter of law ("JNOV" or "judgment notwithstanding the verdict") or, alternatively, for a new trial. We vacate the district court's order and grant Appellant's motion for JNOV on Richards' wantonness cause of action. With respect to Richards' negligence cause of action, Appellant is entitled to a new trial.

I. STATEMENT OF THE CASE

A. *Background Facts*

1. Tire Mounting

Mounting refers to the process of placing the tire onto a metal rim. The first step in the process involves matching the tire to the rim. Matching is extremely important as mismatches can result in explosions, as occurred in this case. Once matched, the tire is fitted around the rim and inflated. During inflation, the tire will "seat" itself against the rim. Once seated, the tire may be inflated to its operating or maximum inflation level.

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[1] Although the suit was filed by John Richards on behalf of Leonard Richards, this opinion makes no such distinction.

While mounting the tire, the person doing the mounting should use a tire cage or some other protective device to insure that he or she will not be harmed in the event of a mishap. The mounter should not stand near the tire to monitor air pressure during the mounting process.

2. Awareness of tire/rim mismatches[2]

Beginning in 1975, the Tire Guide, a publication of the Tire and Rim Association, printed warnings about the danger of mismatches. Appellant first learned of mismatch dangers in 1976. Between 1976 and 1982, Appellant was sued for at least three mismatch accidents. In 1982, Ford Motor Company ("Ford") switched its trucks to 16-inch tires and 16-inch rims from 16.5 inches. Concerned that mismatches would occur as consumers attempted to put new tires and rims onto the older trucks, Ford demanded that its tire suppliers provide warnings of the mismatch hazard on the sidewalls of their 16-inch tires. The exact wording of the warning was up to each individual supplier. With Ford's consent, most of the tire manufacturers added language stating "warning" or "danger." Appellant initially denied Ford's request for a warning because it felt that it was unnecessary[3] and could start a

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[2] By mismatch, we refer to the overinflation of a 16-inch tire on a 16.5-inch rim.

[3] Apparently, this same view was held by the federal Department of Transportation. In 1991, the National Highway Traffic Safety Administration ("NHTSA") declined to adopt more specific marking requirements for tires because NHTSA's review "of its files indicates that there is little evidence of injuries or fatalities attributable to tire and rim mismatch that

dangerous legal precedent. Ultimately Appellant acquiesced and, with Ford's approval, Appellant added the following language to its tires' sidewalls: "Mount only on approved 16-inch rims."[4] Although Appellant stated that this warning would be added to its tire warranty booklets, it did not do so.

3. The accident

Leonard Richards was a 30 year-old farm-hand employed at Driskell Farms in Grand Bay, Alabama. Although his duties included changing tires, his only training in this area occurred on the job. On May 4, 1987, Richards' supervisor, William B. Driskell, asked him to change a flat trailer tire, selecting a 16-inch Michelin tubeless radial tire for the job.[5] While attempting to

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would be alleviated by the proposed changes to the rim labeling requirements. . . . Accordingly, based on current information and analysis, the agency concludes that there are insufficient safety benefits to warrant further rulemaking at this time." 56 Fed. Reg. 41814, 41814 (August 23, 1991).

[4] This language was similar to the warning that Ford stated it would be adding to its owner's manuals: "For 16 inch replacement tires mount only on 16 inch rims, and when replacing with truck type radial tires use only with wheels approved for radial tires."

[5] The Michelin tire involved in this case was a 16-inch light truck radial tire manufactured in 1985. It is uncontroverted that the tire at issue was properly manufactured as designed and that it met or exceeded all federal regulatory requirements. The tire's sidewall was marked "LT 235/85 R16," indicating that it was a 16-inch radial tire. The sidewall also contained the following statements, "**MOUNT ONLY ON APPROVED 16-INCH RIMS**" and "tubeless." Furthermore, in accordance with federal

change the tire, Richards had problems with the old metal rim and was told by Driskell to discard it and get a "16-inch wheel" from the shed.

Richards went to the shed and retrieved a 16.5-inch rim instead of a 16-inch rim. The 16.5-inch size was legibly marked on the rim. Because he continued to have problems changing the tire, Driskell told him to finish the job the next day. The following morning, Richards again tried to mount the 16-inch tire on the 16.5-inch rim. He and a co-worker attempted to mount the tire onto the rim by inserting an inner tube despite the tire's "tubeless" notation and three statements on the inner tube reading "Not For Use in Radial Tires." Further, the inner tube was marked in various locations with its 16-inch size.

In attempting to mount the tire, Richards began to inflate it to 70-75 pounds of pressure, which was ten pounds over its maximum capacity. Although Driskell Farms owned a tire cage, Richards was not using it.[6] After inflating the tire, Richards noticed that it had not yet mounted, stating "if seventy or seventy-five pounds won't push it out, I don't know what will." Some ten seconds later, as he stood above the tire, it exploded, causing him severe physical harm and brain damage.

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regulations, the tire was embossed with notations signifying that its maximum inflation pressure was 65 pounds per square inch ("p.s.i."). *See* 49 C.F.R. § 571.119.S6.5 (1992) (specifying tire markings).

[6] Richards had never been told to use the tire cage when changing single-rim tires, such as the Michelin tire herein.

B. *Procedural History*

On September 22, 1988, Richards sued Appellant and The Budd Company ("Budd"), the rim manufacturer, in an Alabama trial court for injuries incurred while changing the tire. In December of 1988, the case was removed to the federal district court for reasons of diversity jurisdiction, and Ford was added as an additional defendant. Ford and Budd then settled with Richards for $2,000,000.

Richards proceeded to trial with two separate causes of action against Appellant: negligence and wantonness. In his first cause of action, Richards alleged that he was injured because of Appellant's negligence in: (a) designing, manufacturing, assembling, selling and supplying the tire when it knew or had reason to know that the tire was not fit for its intended uses ("design defect claim" or "design claim")[7] and (b) failing to place proper warnings on its tires regarding mismatches ("warning claim"). Richards alleged the same design and warning claims in support of his wantonness cause of action.

After a two week trial, the jury found by special verdict forms that: (1) Appellant was negligent in either designing, manufacturing, and selling the tire or by failing to provide adequate warnings and instructions, and such negligence was the proximate cause of Richards' danger; (2) Appellant failed to show Richards was contributorily negligent; and (3) Appellant was wanton in

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[7] The design defect claim involved Appellant's bead wires, which are wires in the tire that distribute weight along the tire. Richards maintained that the wires were not built strongly enough to withstand overinflation and mismatching.

either designing, manufacturing, and selling the tire or by failing to warn and instruct Richards, and such wantonness was the proximate cause of Richards' damage. The jury returned a verdict against Appellant for $161,475 in compensatory damages and $5 million in punitive damages.[8] After setting off the monies received from Ford and Budd, judgment was entered against Appellant for $3,161,475. On March 24, 1992, Appellant filed a renewed motion for JNOV and alternative motion for a new trial, which was denied.

C. *Standard of Review*

Denial of a motion for JNOV is a question of law which we review *de novo*. *Pinnacle Port Community Ass'n v. Orenstein*, 952 F.2d 375, 378 (11th Cir.1992). In conducting our review, we consider all evidence in the light most favorable to the nonmoving party. *Id.* at 378-79; *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1469 (11th Cir.1991). Reversal of an order denying a motion for JNOV is proper only if the facts and inferences are such that reasonable jurors could not arrive at a contrary verdict. *Davis v. Locke*, 936 F.2d 1208, 1212 (11th Cir.1991). To grant a motion for a new trial, the district court must find the verdict contrary to the great weight of the evidence; we will reverse the denial of a motion for a new trial only for an abuse of discretion. *Jackson v. Magnolia Brokerage Co.*, 742 F.2d 1305, 1307 (11th Cir.1984).

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[8] The jury awarded $161,475 in compensatory damages for both the negligence and wantonness causes of action. The court held that Richards was not entitled to have them added together.

II. ISSUES PRESENTED[9]

A. With respect to either cause of action, is Appellant entitled to JNOV or a new trial if it establishes that the evidence is insufficient to support the verdict under either the warning claim or the design defect claim?

B. Did the district court err in denying Appellant's motion for JNOV or a new trial?

III. ANALYSIS

A. *Sufficiency of the evidence*

Appellant claims that the evidence is insufficient to support the jury's verdict and therefore the district court erred in denying its motion for JNOV or a new trial. Richards disputes this assertion, maintaining that Appellant is not entitled to reversal on either his negligence or wantonness causes of action unless it demonstrates the invalidity of both the design and warning claims with respect to each cause of action (the "two-issue" rule). For example, with respect to negligence, Richards maintains that for Appellant to obtain JNOV or a new trial, Appellant must show that the evidence is insufficient to support the verdict under both the design and warning claims. Richards' argument is premised on the fact that he lumped the design and warning claims into the same cause of action in his complaint. In Count II of his second

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[9] Appellant also claims that the trial court gave several improper jury instructions and that it erroneously limited or excluded certain testimony. We find these claims to be without merit and decline to discuss them further.

amended complaint, he alleged that Appellant was negligent either in designing the tire or by failing to warn about mismatches. He made the same allegations in Count III with respect to wantonness. Similarly, the interrogatories accompanying the verdict distinguished between wantonness and negligence but they did not separate the design claim from the warning claim. The interrogatories simply asked if Appellant was negligent (or wanton) in either its design of the tire or its failure to warn.[10] Because the design and warning claims were

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[10] The verdict forms read in relevant part as follows:

QUESTION NO I: Re: Negligence Claims

Has it been established by a preponderance of the evidence that the defendant Michelin Tire Corporation violated a duty and that Leonard Richards was injured as a result of the breach of the defendant Michelin Tire Corporation's duty by:

YES	NO	Check "YES" or "NO" as to each claim
		CLAIM I: Was the defendant negligent in design, manufacture and sale, supply or distribution of the tire, OR Negligently failing to provide adequate warnings and instructions.
X	_	

If you answered "NO," STOP AND FOREPERSON SIGN.
If you answered "YES," go to Question II.

QUESTION NO. II: Re: Negligence Claims

If you found that the defendant was negligent, do you find that such negligence was a proximate cause of plaintiff's damages.

YES	NO	Check "YES" or "NO"
X	_	

If you answered "NO," STOP AND FOREPERSON SIGN.
If you answered "YES," go to Question III.

united, Richards asserts that Appellant must demonstrate the failure of both claims to succeed on its motion for

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QUESTION NO. III: Re: Contributory Negligence

Has the defendant Michelin Tire Corporation established by a preponderance of the evidence that Leonard Richards was guilty of contributory negligence and was injured as a result of his contributory negligence.

YES	NO	Check "YES" or "NO"
_	X	

If you answered "YES," go to Question No. IV.
If you answered "NO," go to Question No. V.

QUESTION NO. IV:

If you found the plaintiff was contributorily negligent, do you find that such negligence was a proximate cause of plaintiff's damages.

YES	NO	Check "YES" or "NO"
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If you answered "YES," go to Question No. VI.
If you answered "NO," go to Question No. V.

QUESTION NO. V:

We assess the plaintiff's damages at:
$ 36,235.00 for past loss of wages
$ 125,240.00 for future loss of wages
$ 0 for physical pain and mental anguish and suffering

QUESTION NO. VI: Re: Wanton Claim

Has it been established by a preponderance of the evidence that the defendant Michelin Tire Corporation violated a duty and that Leonard Richards was injured as a result of the breach of the defendant Michelin Tire Corporation's duty by:

YES	NO	Check "YES" or "NO"
		Claim 2: The defendant Michelin Tire Corporation was wanton in the design, manufacture and sale,

JNOV or for a new trial with respect to either the wantonness or negligence cause of action. Although Richards is correct with respect to the JNOV motion, Appellant need only show the failure of any one claim to be entitled to a new trial with respect to the underlying cause of action.

Contrary to Richards' contentions, whether the Appellant must demonstrate the invalidity of one or all of Richards' claims does not depend on the structure of Richards' complaint. *See Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 518-19 (5th Cir.1985) (reversing and remanding general verdict for a new trial because one of six different misrepresentations making up plaintiffs' fraud claim was improperly submitted to the jury). Rather, the need to discredit one as opposed to all of the claims

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supply or distribution of the tire, OR Wantonly
X _ failing to warn and instruct Leonard Richards.

If your answer is "NO," STOP AND FOREPERSON SIGN.
If your answer is "YES", go to Question VII.

QUESTION NO. VII:

If you found that the defendant was wanton, do you find that such wantonness was a proximate cause of plaintiff's damages.

YES NO Check "YES" or "NO"

X _

If you answered "NO," STOP AND FOREPERSON SIGN.
If you answered "YES," go to Question VIII.

QUESTION NO. VIII:

We assess the plaintiff's damages at:
$ 36,235.00 for past loss of wages
$ 125,240.00 for future loss of wages
$ 0 for physical pain and mental anguish and suffering

Go to Question No. IX.

depends on the type of verdict rendered and the motion made, i.e., whether Appellant is seeking JNOV or a new trial. *King v. Ford Motor Co.*, 597 F.2d 436, 439 (5th Cir.1979).[11] In other words, the fact that Richards lumped his negligent design and negligent failure to warn claims into one cause of action and did the same with his wanton design and wanton failure to warn claims is of no consequence. *See Ratner*, 770 F.2d at 518-19.

With respect to each cause of action, the jury's verdict was a general verdict. *See Toole v. McClintock*, 999 F.2d 1430, 1433 (11th Cir.1993) (where jury instructed that defendant could be liable for either designing an unreasonably dangerous product or for a negligent warning, verdict was a general verdict); *Bryan v. John Bean Div. of FMC Corp.*, 566 F.2d 541, 543 n. 1, 549 (5th Cir.1978) (general verdict may be accompanied by special interrogatories).[12] Because the jury returned a general verdict, to be entitled to JNOV on either the wantonness or negligence cause of action, Appellant must show that Richards failed to make out a case under both his design and warning claims. *Cronin v. Washington Nat'l Ins. Co.*, 980 F.2d 663, 669 n. 7 (11th Cir.1993); *Carroll Kenworth Truck Sales v. Kenworth Truck Co.*, 781 F.2d 1520, 1528-29 (11th

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[11] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[12] This case involves a general verdict via disjunctive interrogatories. Thus, Richards' reliance on *Stewart & Stevenson Servs. v. Pickard*, 749 F.2d 635 (11th Cir.1984) is misplaced as it concerned a Federal Rule of Civil Procedure 49(a) special verdict utilizing non-disjunctive interrogatories.

Cir.1986). Thus, with regard to the JNOV motion, the "two-issue" rule applies.

However, the "two-issue" rule is inapplicable to a motion for a new trial as Appellant, with respect to each cause of action, need only show that the evidence is insufficient to support either one of Richards' claims to prevail on its motion for a new trial. *Carroll Truck Sales*, 781 F.2d at 1528-29; *see also Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1099 (11th Cir.1983) ("[U]nless [Richards] can support submission of each theory of liability submitted to the jury, we must remand for a new trial.").[13] Where, as here, two or more claims are

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[13] Richards relies on *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 748 F.2d 1543 (11th Cir.1984), *overruled on other grounds by Lindsay v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1101-02 (11th Cir.1987) in support of his argument that the "two-issue" rule applies to motions for a new trial. In *O'Donnell*, the jury said "yes" in response to an interrogatory asking, " 'Did the defendant either discriminate against the plaintiff because of her age or retaliate against the plaintiff because she filed a charge of age discrimination?' " 748 F.2d at 1549. The *O'Donnell* defendant moved for JNOV or a new trial based primarily on insufficiency of the evidence. We stated that the jury verdict could be affirmed "with a decision that the evidence under either prong is sufficient to overcome the [defendant's motion]." *Id.* Although this statement was less than a model of clarity, a close reading of the opinion shows that it encompassed only the motion for JNOV. *See id.* at 1549-50 (implying that both of plaintiff's claims were properly submitted to the jury because plaintiff had shown that age was a determining factor in defendant's decisions regarding plaintiff's job placement). Moreover, it is well-settled that where one of two possible bases for a general verdict is unauthorized, the entire verdict must be reversed even though the other basis would support the verdict. *United New York and New Jersey Sandy Hook Pilots Ass'n v. Holecki*,

submitted to the jury in a single interrogatory, a new trial may be required if either of the claims was erroneously submitted, as there is no way to be sure that the jury's verdict was not predicated solely on the invalid claim. *Prudential Ins. Co. v. Morrow*, 339 F.2d 411, 412-13 (5th Cir.1964); *Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1286 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 187, 121 L.Ed.2d 132 (1992); *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir.), *cert. denied*, 469 U.S. 883, 105 S.Ct. 252, 83 L.Ed.2d 189 (1984).[14] Thus, if error is shown on any of Richards' claims, reversal of the underlying cause of action is warranted. *Smith v. Southern Airways, Inc.*, 556 F.2d 1347-48

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358 U.S. 613, 618-19, 79 S.Ct. 517, 520, 3 L.Ed.2d 541 (1959); *Maccabees Mut. Life Ins. Co. v. Morton*, 941 F.2d 1181, 1184 (11th Cir.1991); *Walden v. United States Steel Corp.*, 759 F.2d 834, 838 (11th Cir.1985).

[14] "An interrogatory containing multiple issues is really no better than a general verdict." *Dougherty v. Continental Oil Co.*, 579 F.2d 954, 960 n. 1 (5th Cir.1978) (citing *Laguna Royalty Co. v. Marsh*, 350 F.2d 817, 823-24 (5th Cir.1965)), *vacated on joint stipulation of the parties*, 591 F.2d 1206 (5th Cir.1979). It presents the same dilemma as a general verdict submitted on two or more theories of law, one of which is invalid or incorrect. As we cannot determine upon which theory the jury verdict is predicated, we must reverse if either theory was invalid or incorrectly submitted to the jury. *Id.* at 960 n.1; *Crist*, 957 F.2d at 1286. Accordingly, district courts should avoid questions that combine two issues disjunctively because a "yes" or "no" answer may refer to either issue. *See* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2508, at 507 (1971); *see also Cunningham v. M-G Transport Servs.*, 527 F.2d 760, 761-62 (4th Cir.1975) (interrogatories should be limited to one issue per question). Instead, we suggest courts structure interrogatories in a manner similar to that used in *Bryan*, 566 F.2d at 543 n. 1.

(5th Cir.1977); *Lee v. Wal-Mart Stores, Inc.*, 943 F.2d 554, 560 (5th Cir.1991), *as amended*, 951 F.2d 54 (5th Cir.1992).[15]

B. *Denial of J.N.O.V./new trial motion*

Appellant asserts that the evidence is insufficient to support a finding of wantonness or negligence on either, or both, the design defect or warning claims. Thus, it contends that the award of compensatory and punitive damages must be vacated. We agree.

1. Negligent design defect claim[16]

To prove defectiveness under Alabama law, a plaintiff must prove that a safer, practical, alternative design

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[15] Richards contends that because Appellant did not object to the special verdict forms, it waived its right to appeal. Alternatively, he argues that the failure to object authorizes this Court to sustain the verdict based on either claim. We reject these assertions. The failure to object to a proposed verdict format does not waive the right to object to the sufficiency of the evidence. *See, e.g., Austin-Westshore Constr. v. Federated Dep't Stores*, 934 F.2d 1217, 1226 (11th Cir.1991). If one of Richards' claims lacked sufficient evidence to have been submitted to the jury, it is well-settled that we must reverse the jury's verdict. *See supra*, text accompanying notes 10-14. Furthermore, the record indicates that the court rejected Appellant's thirty-two interrogatories and instead chose the "either . . . or" interrogatories used in this case. Under these circumstances, it was the court's responsibility to ensure that the interrogatories were not deficient, i.e., to guarantee that they differentiated between the design and warning claims. *Laguna Royalty*, 350 F.2d at 823-25.

[16] The parties are correct in asserting that Alabama law governs this appeal.

was available to the manufacturer at the time it manufactured its product. *Beech v. Outboard Marine Corp.*, 584 So.2d 447, 450 (Ala.1991); *Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1507 (11th Cir.1990), *cert. denied*, 498 U.S. 1048, 111 S.Ct. 756, 112 L.Ed.2d 776 (1991). In *Beech*, the Alabama Supreme Court stated:

> The existence of a safer, practical, alternative design must be proved by showing that: (a) [t]he plaintiff's injuries would have been eliminated or in some way reduced by use of the alternative design; and that (b) taking into consideration such factors as the intended use of the [product], its styling, cost, and desirability, its safety aspects, the foreseeability of the particular accident, the likelihood of injury, and the probably seriousness of the injury if that accident occurred, the obviousness of the defect, and the manufacturer's ability to eliminate the defect, the utility of the alternative design outweighed the utility of the design actually used.

584 So.2d at 450 (citation omitted). Thus, under *Beech*'s first prong, Richards must show that some alternative design existed that would have eliminated or reduced his injuries. *Beech*'s second prong requires Richards to show that the alternative design was of greater overall safety than the design actually used. *See id.* (alternative design creating other dangers is not a safer design).

In this case, Richards demonstrated that Appellant could have created a tire with a larger bead wire or stronger beads and that, as compared to Appellant's tire, other manufacturers had bead wire designs that could withstand greater overinflation without bursting when mismatched. Accordingly, Richards satisfies *Beech*'s first

prong. However, Appellant correctly asserts that Richards made no showing with regard to *Beech*'s second prong – that a tire utilizing a stronger bead wire that can better withstand overinflation when mismatched is of greater overall safety than the Michelin tire in question.[17] Appellant presented evidence demonstrating that Michelin's beads were "superior" and that it is contrary to overall safety to have the strongest possible bead wire as the tire will not track and the vehicle will be undriveable on a highway. By contrast, Richards simply contends that because other tire manufacturers designed and sold tires employing these stronger beads, they must have concluded that the tires were of greater overall safety. The fact that an alternative design existed which would have reduced or eliminated Appellant's injuries does not mean that the alternative design was of greater overall safety. *See Vines v. Beloit Corp.*, 631 So.2d 1003 (Ala.1994) (affirming summary judgment on design defect claim where

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[17] Richards contends that he has shown that a feasible, safe, alternative design existed by means of the following: (1) tests from 1973 and 1990 demonstrating that certain tires could withstand 200 p.s.i. when mismatched; (2) expert testimony stating that the bead wire technology used by these tires had been available since the 1930's; (3) Goodyear Tire Company was regularly using this type of bead by 1985; and (4) Michelin could have used, and at times did use, this type bead. Assuming that the record supports Richards' characterization of the evidence, it still does not address overall safety. The mere fact that stronger tires were made and sold by other manufacturers does not mean that such tires were safer than the Michelin tire at issue here. Had Richards proffered his own experts, perhaps he would have been able to demonstrate greater overall safety. However, on this record, Richards has not made such a showing.

plaintiff presented no evidence that alternative design would reduce risks to workers, make the product safer, or have greater utility than product as presently designed); *Beech*, 584 So.2d at 450 (existence of feasible, alternative design does not establish existence of practical, safer, alternative design).[18] Thus, we conclude that insufficient evidence exists with regard to Richards' negligent design defect claim. Appellant does not challenge the sufficiency of the evidence with respect to Richards' negligent failure to warn claim. However, because we cannot determine whether the negligence verdict was improperly based on the design claim, we must, and do, reverse the district court's denial of Appellant's motion for a new trial with regards to the negligence cause of action.

2. Wanton design claim

Wantonness is to be determined by the facts and circumstances of each case. *Joseph v. Staggs*, 519 So.2d 952, 954 (Ala.1988).[19] To be guilty of wantonness, the plaintiff

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[18] Relying on *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 470 (11th Cir.1993), Richards contends that he need not show proof of a safer, alternative design. However, *Reynolds* involved liability for mismatched rim parts under the Alabama Extended Manufacturer's Liability Doctrine and it is therefore inapposite to this case.

[19] For all cases filed after June 11, 1987, Alabama law requires that a plaintiff prove wantonness by "substantial evidence" to receive compensatory damages. *Hamme v. CSX Transp., Inc.*, 621 So.2d 281, 282-83 (Ala.1993); *Rommell v. Automobile Racing Club of Am., Inc.*, 964 F.2d at 1097 (11th Cir.1992). For claims accruing prior to June 11, 1987, this same standard governed the award of punitive damages. However, for claims

must show that a defendant, with reckless indifference to the consequences, consciously and intentionally did some wrongful act or omitted some known duty with *knowledge* of the existing conditions and that this act or omission would likely or probably lead to the plaintiff's injury. *Id; Lakeman v. Otis Elevator Co.*, 930 F.2d 1547, 1553 (11th Cir.1991) (quoting *Lynn Strickland Sales and Serv. v. Aero-Lane Fabricators, Inc.*, 510 So.2d 142, 145 (Ala.1987)); *see also* ALA.CODE § 6-11-20(b)(3) (Supp.1989) (codifying common law standard of wantonness). Wantonness requires "knowledge that an act or failure to act does not merely increase the risk of injury, but that the act makes injury 'likely' or 'probable' " *Toole*, 999 F.2d at 1435; *see also Coca-Cola Bottling Co. United, Inc. v. Stripling*, 622 So.2d 882, 884-85 (Ala.1993); *Salter v. Westra*, 904 F.2d 1517, 1524-1527 (11th Cir.1990). Finally, wantonness is not negligence:

> While it may be difficult to define the exact point at which the probability of harm is sufficient to support a jury's finding of wantonness, courts and juries must attempt to discern that line in light of the fact that wantonness is distinct from negligence, and punitive damages are

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accruing on or after June 11, 1987, wantonness must be shown by clear and convincing evidence to be awarded punitive damages. ALA.CODE § 6-11-20(a) (Supp.1989). Here, Richards' claim accrued prior to June 11, 1987. Thus, the district court erred in charging that his burden of proof for punitive damages was the "clear and convincing evidence" standard. However, because we hold that Richards has failed to prove even substantial evidence of wantonness, this error is harmless.

> meant "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future."

Salter, 904 F.2d at 1526 (alteration in original) (citations omitted).

With regard to the wanton design claim, the question we are confronted with is whether Appellant consciously and intentionally refused to employ available technology (some safer, practical, alternative design) in reckless disregard of the fact that its failure to do so made the risk of mismatch explosions probable or likely. As Richards failed to show the existence of a safer, practical, alternative design, it cannot be said that Appellant refused to use such a design. Consequently, insufficient evidence supported Richards' wanton design claim.

3. Wanton failure to warn claim

Under Alabama law:

> The manufacturer of a product which may be reasonably anticipated to be dangerous if used in a way which [it] should reasonably foresee it would be used is under a duty to exercise reasonable care to give reasonable and adequate warnings of any dangers known to [it], or which in the exercise of reasonable care [it] should have known and which the user of the product obviously could not discover.

Bean v. BIC Corp., 597 So.2d 1350, 1353 (Ala.1992). Thus, in terms of wantonness, the issue is whether Appellant consciously and intentionally failed to give reasonable and adequate warnings with knowledge of, or reckless

indifference to, the fact that the lack of warnings made Richards' injury likely or probable.

While conceding that it knew of mismatches, Appellant maintains that the undisputed evidence demonstrates that out of the thirteen to fifteen million 16-inch tires it has manufactured, it knew of only four mismatches. It therefore insists that the punitive damages award must be vacated as insufficient evidence exists to show that it knew its conduct was likely to result in injury. Richards disagrees, contending that under Alabama law, if injury to even one person is likely or probable, then a manufacturer's failure to provide warnings constitutes wantonness. As Appellant knew of four mismatches, Richards asserts that its failure to warn constitutes wantonness.

Contrary to Richards' assertions, notice of prior injuries does not automatically create a jury question on wantonness. *Toole*, 999 F.2d at 1435; *Rommell v. Automobile Racing Club of Am., Inc.*, 964 F.2d 1090, 1096-98 (11th Cir.1992); *see also Benford v. Richards Med. Co.*, 792 F.2d 1537, 1538-39 (11th Cir.1986) (defendant not wanton despite knowing of the potential dangers of using steel in manufacturing hip prosthesis). In *Toole*, we reversed an award of punitive damages, holding that because the likelihood that silicone gel breast implants would rupture during surgery was less than one percent, such harm cannot be considered a "likely" event. 999 F.2d at 1435. Similarly, in *Rommell*, we held that the defendant racing association's knowledge of pit fires did not create a jury question as to whether the defendant was wanton in failing to provide pit crews with non-flammable clothing. 964 F.2d at 1096-98. Here, the evidence demonstrated that

the actual incidence of mismatches was roughly one in millions and that Appellant knew of only four other mismatch incidents. Had Appellant been aware of a greater number of mismatch accidents, we may well have reached a different conclusion. However, based on this record, it cannot be said that mismatch explosions are likely or that the failure to warn Richards of the risks of mismatches made such explosions likely.[20]

Furthermore, Appellant's compliance with both federal regulations and industry practices is some evidence of due care. *Elliot v. Brunswick Corp.*, 903 F.2d 1505, 1508 (11th Cir.1990), *cert. denied*, 498 U.S. 1048, 111 S.Ct. 756, 112 L.Ed.2d 776 (1991); *Dunn v. Wixom Bros.*, 493 So.2d 1356, 1359-60 (Ala.1986).[21] We have repeatedly held that

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[20] Richards' expert witness testified that the tire's sidewall language did not meet his definition of a warning and that an adequate warning would have prevented Richards' accident. However, he also conceded that at the time the tire was manufactured, there was evidence that on-product warnings did not contribute to safety. Moreover, as discussed more specifically in footnote 3, *supra*, the National Highway Traffic Safety Administration declined to adopt more specific marking requirements for tires on the theory that the safety benefits would be insufficient. Thus, while more could have been said or done, Appellant's conduct cannot be seen as wanton. *Toole*, 999 F.2d 1436; *see Salter*, 904 F.2d at 1526-27 ("A jury may not find wantonness simply on the basis of a defendant's awareness that his actions (or failure to act) would entail more risks than not taking the action in question."); *Stallworth v. Illinois Cent. Gulf R.R.*, 690 F.2d 858, 863 (11th Cir.1982) (negligence in failing to appreciate the dangerousness of conditions is not wantonness).

[21] We decline to accept the invitations of Appellant and Amici to hold that compliance with 49 C.F.R. § 571.119 precludes a finding of wantonness.

the issue of punitive damages should not go to the jury when a manufacturer takes steps to warn the plaintiff of the potential danger that injured him; such acts bar a finding of wantonness. *Toole*, 999 F.2d at 1436; *Kritser v. Beech Aircraft Corp.*, 479 F.2d 1089, 1096-97 (5th Cir.1973) (applying Texas law similar to Alabama law). In this case, the record demonstrates that Appellant complied with all requisite Federal Motor Vehicle Safety Standards, including Standard 119, which requires that "sufficient information [be placed] on the tires to permit their proper selection and use." *See* 49 C.F.R. § 571.119 (1992). Appellant embossed its tires with a sidewall marking indicating that the tire was a 16-inch radial tire. 49 C.F.R. § 571.119.S6.5(c). It placed information regarding tire-rim matching in the Tire and Rim Association's yearbook, § 49 C.F.R. § 571.119.S5.1, and in its own Passenger Light Truck Data Book. Appellant included similar information in materials provided to tire dealers and retailers and to various tire publications. Further, Appellant complied with Ford's request to place a warning on the tire by placing the following language onto its tires, "Mount only on approved 16 inch rims."[22] As shown, Richards has not demonstrated sufficient evidence of wantonness

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[22] Richards claims that Michelin did not comply with industry standards because the language it added to its tires was only an instruction as opposed to the warning language used by Goodyear, Goodrich, Uniroyal and other tire makers. However, as with Appellant, these other tire makers placed warnings on their tires at the request of Ford which, significantly, also approved Michelin's language.

on his failure to warn claim.[23] Because Richards similarly failed to demonstrate sufficient evidence on his wanton design claim, JNOV should be granted in Appellant's favor with respect to Richards' wantonness cause of action.

IV. CONCLUSION

We VACATE the district court's denial of Appellant's alternative motions. We GRANT Appellant's motion for JNOV on Richards' wantonness cause of action. We likewise GRANT Appellant's motion for a new trial on Richards' negligence cause of action and REMAND for further proceedings consistent with this opinion.

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[23] The cases relied on by Richards in support of his wanton design defect claim are easily distinguishable. *Lakeman v. Otis Elevator,* 930 F.2d 1547 (11th Cir.1991) involved inherently dangerous fumes from a cleaning solution while *Caterpillar, Inc. v. Hightower,* 605 So.2d 1193, 1196 (Ala.1992) concerned an open compartment skidder machine made in clear violation of industry standards. Although some parallels exist between this case and that of *Sears, Roebuck and Co. v. Harris,* 630 So.2d 1018 (Ala.1994) (defectively installed water heater), *Sears* too is distinguishable as it included expert testimony that the product was defective or unreasonably dangerous. No such testimony is present in this case.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6547

JOHN RICHARDS, as Conservator, etc.,
Plaintiff-Appellee,

versus

MICHELIN TIRE CORP.,
Defendant-Appellant,

THE BUDD COMPANY,
FORD MOTOR CO.,
Defendants.

On Appeal from the United States District Court
for the Southern District of Alabama

(Filed Aug. 17, 1994)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: BLACK, Circuit Judge and JOHNSON and HENDERSON, Senior Circuit Judges

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHN RICHARDS, as Conservator and Guardian of the Estate of LEONARD RICHARDS, Plaintiff,	)	CIVIL ACTION NO. 88-1022-P-C
v.	)	(Filed March 12, 1992)
MICHELIN TIRE CORPORATION, Defendant.	)	

JUDGMENT

Pursuant to an agreement between the attorneys for the parties, this judgment is entered pursuant to the jury's interrogatories filed the 14th day of February, 1992.

Judgment is hereby entered for the plaintiff against the defendant Michelin Tire Corporation as follows:

For the plaintiff, John Richards, as Conservator and Guardian of the Estate of Leonard Richards, compensatory damages in the amount of $161,475.00 (One Hundred Sixty-One Thousand Four Hundred Seventy-Five Dollars) on the negligence and wanton claims and punitive damages in the amount of $5,000,000.00 (Five Million Dollars) on the wanton claim, totalling $5,161,475.00 (Five Million One Hundred Sixty-One Thousand Four Hundred Seventy-Five Dollars).

The defendant Michelin Tire Corporation is entitled to a set-off in the amount of $2,000,000.00 (Two Million Dollars). The set-off represents the amount received by the plaintiff in *pro tanto* settlements with defendants Ford

Motor Company and The Budd Company, who have been severed from this action. Therefore, the amount of judgment for the plaintiff John Richards against defendant Michelin Tire Corporation is $3,161,475.00 (Three Million One Hundred Sixty-One Thousand Four Hundred Seventy-Five Dollars).

Costs are taxed against the defendant.

DONE the 12th day of March, 1992.

/s/ Virgil Pittman
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
123 UNITED STATES COURTHOUSE
MOBILE, ALABAMA

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CIVIL ACTION NO. 88-1022-P

JOHN RICHARDS, et al vs. MICHELIN TIRE CORP., et al

You are advised that on the 4th day of June, 1992, the following action was taken in the above styled cause by:

Senior U.S. District Judge Virgil Pittman

U.S. Magistrate Judge ___

MOTION BY MICHELIN TIRE CORPORATION FOR JUDGMENT AS A MATTER OF LAW AND ALTERNATIVE MOTION FOR NEW TRIAL is **denied.**

MOTION FOR LEAVE TO INTERVIEW JURORS filed by Michelin Tire Corporation on

May 18, 1992 is **denied.** See Local Rule #12 and no good reason shown.

JOHN V. O'BRIEN, Clerk

By: /s/ Melanie Graves
Deputy Clerk

Supreme Court, U.S.
FILED
DEC 15 1994
OFFICE OF THE CLERK

No. 94-906

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN RICHARDS, as Conservator and Guardian of LEONARD RICHARDS,

Petitioner,

v.

MICHELIN TIRE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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38 pp

QUESTIONS PRESENTED

1.

Whether the Court of Appeals for the Eleventh Circuit committed reversible error in holding that the trial evidence was insufficient on the petitioner's claim of design defect?

2.

Whether the Court of Appeals for the Eleventh Circuit committed reversible error in holding that the trial evidence was insufficient to establish the intentional, malicious, or wanton misconduct on the part of Michelin Tire Corporation necessary to sustain an award of punitive damages?

PARTIES

The petitioner is John Richards, as conservator and guardian of Leonard Richards.

The respondent is Michelin Tire Corporation. The Compagnie Generale Des Etablissements Michelin is the only entity related to Michelin Tire Corporation with publicly-traded shares. The shares are traded only on the Paris stock exchange and are nonvoting.

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OPINION BELOW

The decision of the Court of Appeals for the Eleventh Circuit is reported at 21 F.3d 1048 (11th Cir. 1994). The Court of Appeals' denial of Mr. John Richards' application for en banc review is not reported to date but is reprinted in the petitioner's appendix at 25a-26a. The judgment of the United States District Court for the Southern District of Alabama and its denial of Michelin Tire Corporation's post-judgment motions for new trial and judgment as a matter of law are not reported, but are reprinted in the petitioner's appendix at 27a-30a.

GROUNDS FOR JURISDICTION

Jurisdiction to consider the Petition exists under 28 U.S.C.A. § 1254(1) (1993).

STATUTES AND REGULATIONS INVOLVED

The detailed federal regulation with which the Michelin tire at issue complied is 49 C.F.R. § 571.119 (October 1, 1985 edition) ("Federal Motor Vehicle Safety Standard 119" or "Standard 119"). This lengthy regulation is set forth in the Appendix to this response.

STATEMENT OF THE CASE

I. Course of Proceedings Below

The petitioner filed this products liability action in the Circuit Court of Mobile County, Alabama, on September 22, 1988 against The Budd Company ("Budd"), and the Michelin Tire Corporation ("Michelin"). [R. Vol. 1, Tab 1] On December 16, 1988, the case was removed pursuant to 28 U.S.C. §1441(a) to the United States District Court for the Southern District of Alabama. [R. Vol. 1, Tabs 2-3] The Ford Motor Company ("Ford") was thereafter added as an addi-

tional defendant. [R. Vol. 1, Tabs 33-34, Vol. 2, Tab 35]

Ford and Budd settled with the petitioner for $1,000,000 each, or a total of $2,000,000. The case against Michelin was tried before a jury from February 4-14, 1992. The jury returned a verdict against Michelin in the amount of $161,475.00 in compensatory damages and $5,000,000.00 in punitive damages. [R. Vol. 6, Tab 218] After a set-off of the amounts paid in settlement, judgment was entered against Michelin in the amount of $3,161,475.00 on March 12, 1992. [R. Vol. 6, Tabs 221-22, 224-26] Michelin's post-trial motions were summarily denied. [R. Vol. 6, Tabs 227-29, 236, 240]

The Court of Appeals for the Eleventh Circuit reversed the district court's judgment and directed that judgment be entered in Michelin's favor on the petitioner's claim for punitive damages and claim for compensatory damages based on the design defect and wantonness counts. The Eleventh Circuit remanded the case for a new trial on the sole remaining claim for compensatory damages based on allegedly negligent failure to warn. *Richards v. Michelin Tire Corp.*, 21 F.3d 1048 (11th Cir. 1994).

II. The Trial Evidence

This is a case of undisputed misuse of a Michelin tire. Because Mr. Leonard Richards was attempting to mount the tire in a manner violating virtually every important rule of tire mounting, the tire ruptured, causing severe personal injury.

The petitioner's recitation of the trial evidence is inaccurate. Among other things, the petitioner has cited to "evidence" which was specifically excluded by the district court and evidence which was excluded for the purpose for which it is cited. The petitioner has also failed to set forth other, important evidence and draws unsupported conclusions. Pursuant to United States Supreme Court Rule

15.1, this response will address the "misstatements of fact" set forth in the petition.

A. The Michelin Tire and Its Intended Use.

The Michelin tire involved in this case was a 16-inch light truck tire manufactured in June of 1985. [T. at 113, 410-12, 1089] A "16-inch" tire refers to one with a 16-inch diameter of the inner edge or "bead." [T. at 1092]

It is undisputed that the Michelin tire at issue was properly manufactured as designed. It is undisputed that the Michelin tire met or exceeded all federal regulatory requirements [T. at 1086-90, 1101-04], including Federal Motor Vehicle Safety Standard 119 ("Standard 119"), 49 C.F.R. § 571.119, which governs, among other things, tire sidewall markings, tire-rim matching information, endurance, strength, high speed performance, treadwear indicators, and mandatory testing. *Id.*

It is undisputed that the Michelin tire was entirely safe when used and handled as intended. The issues at trial focused only upon the suitability of the tire when it was unquestionably misused.

Like all tires, the Michelin tire in this case was designed to be used and handled in several specific ways:

1. Matching Rim — The Michelin tire was designed for use with a *matching* metal rim or wheel. The 16-inch tire in this case was designed to be used with a corresponding 16-inch rim.

Michelin provided a great deal of information apprising potential tire mounters of the size of its tire and the need for a matching rim. First, the tire contained on its sidewall the following statement:

MOUNT ONLY ON APPROVED 16-INCH RIMS

[Ptf. Ex. 23] This was an extra sidewall statement not required by federal regulations.

Second, Michelin complied with the comprehensive federal regulations governing the dissemination of information about tire-rim matching. Standard 119 specifically addresses "Tire and rim matching information" and grants to tire manufacturers the option of "ensur[ing] that a listing of the rims that may be used with each tire that he produces is provided to the public" by either (1) including the information in publications of at least one of several private industry groups, including the Tire and Rim Association (TRA), or (2) filing it with the National Highway Traffic Safety Administration ("NHTSA"). 49 C.F.R. §571.119.S51. There is no dispute that Michelin fully complied with the section S5 of Standard 119 by providing to the public through the TRA Yearbook all the information necessary for determining which rims matched which of its tires. [T. at 1080-86]

Third, Michelin complied with Standard 119's requirement of a sidewall marking of specific size, location, and depth, stating for the purposes of tire-rim matching the size of the tire. 49 C.F.R. §571.119.S6.5(c). The Michelin tire had embossed on its sidewall a sizemarking of "LT 235/85 R16," indicating its dimensions. "R16" means that the tire is a 16-inch radial tire. [T. at 1090-92; Pltf. Ex. 23][1]

Fourth, Michelin distributed the Michelin Passenger Light Truck Data Book. [T. at 735-38, 1097; Def. Ex. 14] The Data Book contains substantially the same information as the

[1] "LT" indicates that the tire is for use on light trucks. The notation "235/85" means that the tire sidewall-to-sidewall width is 235 millimeters and aspect ratio is 85% (the height of the tire is 85% of the width). [T. 1091] These markings are also required by Standard 119. 49 C.F.R. § 571.119.S6.5(c).

TRA Yearbook regarding which rims match this and other tires. [T. at 735-38, 1097; Def. Ex. 22]

Fifth, Michelin distributes and makes available to tire dealers and retailers (the people who typically mount tires) an additional package of literature published by the Rubber Manufacturer's Association (RMA) and OSHA.[2] [T. at 208-10, 225-26, 424, 1131-36] The package includes posters, leaflets, and other materials explaining in detail the proper methods for mounting tires. [T. at 1131-36; Def. Ex. 6, 8, 9, 10, 11, 16, 18, 20] Michelin helps to fund and provides technical data for inclusion in the RMA materials. [T. at 208-10, 225-56, 424, 1133-34] The materials *specifically warn* about the risks associated with mounting a tire on the wrong-sized rim. [T. at 209, 1132; Def. Ex. 6, 8, 9, 10, 11, 16, 18, 20]

Sixth, The Tire Guide, a yearly publication widely used and known in the industry, also contains the same tire-rim matching information. Like the RMA and OSHA material, The Tire Guide includes a specific warning about the risks of mismatching tires and rims which has appeared in every annual edition since 1976. [T. at 380, 384-85, 387, 390, 1094; Def. Ex. 24-26]

Seventh, to promote the proper training of tire mounters and users, Michelin maintains an instructional facility in Greenville, South Carolina. This facility is open to dealers, customers, and Michelin employees. [T. at 1174-75]

In short, to disseminate information about the size of its tires and which rims matched which tires, Michelin did far more than what the federal regulations state is "sufficient." 49 C.F.R. §571.119.S2. Moreover, Michelin disseminated tire-rim matching information through the TRA, an option specifically authorized by federal law. *Id.*, S5.1.

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[2] Because Driskell Farms is not subject to OSHA regulation, references to OSHA as the source of some of the materials was excluded at trial. [T. at 1121]

2. Proper Pressurization — The Michelin tire was designed to be inflated with air not exceeding a specified pressure. The maximum pressure for the tire at issue was 65 p.s.i. [T. at 730-34, 1143-44]

Federal regulations dictate precisely how tire manufacturers must indicate on their tires the maximum inflation pressure. Standard 119 sets forth the required wording, location of the marking (on the sidewall), size of the lettering, depth or height of the lettering, and number of markings. 49 C.F.R. §571.119.S6.5. There is no dispute that the Michelin tire in this case was in complete, verbatim compliance with the regulations. The tire was embossed with the notations, "Max. load single 2625 lbs. at 65 p.s.i. cold" and "Max. load dual 2330 lbs. at 65 p.s.i. cold."[3] [T. at 733-34; Pltf. Ex. 23]

In addition to the information on the tire sidewalls, the Data Book, the TRA Yearbook, and The Tire Guide also all state the maximum inflation pressure for the Michelin tire. [T. at 280-81; Def. Ex. 14, 22, 24-26] Moreover, the RMA and OSHA-printed materials distributed and made available by Michelin warn against overinflation. [Def. Ex. 6, 8, 9, 10, 11, 16, 18, 20]

3. Proper Mounting — The tire was designed to be mounted on a metal rim by a properly-trained individual in accordance with correct mounting procedures. Untrained persons should not mount tires. Mounting tires is a process that requires specialized skill and equipment. [Def. Ex. 6, 8, 9, 10, 11, 16, 18, 20]

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[3] The quoted language states the tire's maximum capacity. The tire's ability to support a load is directly dependent upon the pressure to which it is inflated.

Correct mounting first and foremost involves selecting a tire and rim of matching size. [T. at 1136] After the correctly-sized rim has been selected and the tire edges lubricated, the tire is fitted around the metal rim. This process is known as "buttoning." [T. at 1136-39; Def. Ex. 6, 8, 9, 10, 11, 16, 18, 20]

Because tire-wheel assemblies are subject to high inflation pressures, a tire should never be inflated unless it is buttoned to a rim which is *attached* to a mounting machine or vehicle, or unless the tire is *shielded*. [T. at 1144-47; Def. Ex. 6, 8, 9, 10, 11, 16, 18, 20] A mounter should *never* stand over a tire while inflating it or while monitoring the inflation pressure. Spring-loaded (clip-on) chucks should be used to attach the compressor hose to the tire valve so the mounter can stand back during inflation. Similarly, the inflation pressure should be monitored with an in-line pressure gauge — not a "pen"-type valve-stem gauge — so the mounter can continuously monitor the pressure and stand back. [T. at 1144-47; Def. Ex. 6, 8, 9, 10, 11, 16, 18, 20]

Shortly after inflation begins, a tire will "seat" itself against the flange of a matching rim. That is, the tire will "pop out" so that its inner beads are flush against the flange. Tires usually will "seat" at about 10-20 p.s.i. [T. at 1143]

It is undisputed that 40 p.s.i. is the *maximum* pressure that should be used in trying to "seat" a tire. If the tire has not seated at 40 p.s.i., the mounter should know that something is wrong and stop adding air. [Def. Ex. 6-11, 16, 18, 20, 24-26]

Only after the tire has been seated may it be pressurized up to either its operating or its maximum inflation level. [T. at 1143] The maximum pressure for the tire in this case, as noted before, was 65 p.s.i. [T. at 730-34, 1143-44]

4. Use Without An Inner Tube — The tire in this case was designed for use without an inner tube. An inner tube is unnecessary to maintain pressure since a proper tire/rim combination is airtight. [T. at 1066, 1123] In accordance with Standard 119, the tire contains on its sidewall the designation "tubeless." See 49 C.F.R. §571.119.S6.5(g). [T. at 1103-04; Pltf. Ex. 23]

B. The Multiple Product Misuses and Their Consequences.

It was undisputed that the tire in this case was misused in all of the following ways:

1. The 16-inch tire was mounted on a wrong-sized, 16 1/2-inch rim;
2. The tire was overinflated beyond the maximum seating pressure of 40 p.s.i. without the tire seating;
3. The tire was overinflated beyond its ultimate maximum capacity of 65 p.s.i.;
4. The tire was inflated while unrestrained without the use of a cage or shielding, without the use of a clip-on chuck or in-line pressure gauge, with the plaintiff standing over it; and
5. The tire was incorrectly mounted with an inner tube.

Having simultaneously violated all of these fundamental rules of tire mounting, Mr. Richards was injured when the mismatched and overinflated tire finally ruptured. [T. at 270-71, 274-75, 288, 296, 298, 316, 318, 343-46, 373-74]

It is undisputed that Mr. Richards would not have been injured but for the combination of multiple product misuses. According to the trial evidence, the Michelin tire will not burst unless it is both mismatched with a wrong-sized rim and overinflated. [T. at 846-49; Pltf. Ex. 36-37] And,

Mr. Richards would never have been injured had he followed any one of the other tenets of tire mounting. [T. at 1123-24, 1144-48]

C. The Rarity of Mismatch Injuries.

Given the enormous number and different sizes of tires and rims sold, in circulation, mounted, and remounted every year in the United States, the possibility that a tire mounter might carelessly select the wrong rim was not unheard of to Michelin in 1985, when the subject tire was manufactured. Michelin has never disputed knowledge of the mismatch phenomenon.

Tire-rim mismatches, however, were quite rare. For example, of the multiple millions of 16-inch tires sold by Michelin for use in the United States, the evidence at trial showed only 4 mismatches involving Michelin tires. [T. at 153-54, 422-24, 1205-06][4] As the Eleventh Circuit correctly noted, the risk of a mismatch injury is on the order of one in millions. 21 F.3d at 1058. It is not, as petitioner claims, a rampant "national problem."

D. The Petitioner's Design Defect Claim.

The petitioner claimed that Michelin's bead wire design[5] was defective, although no expert testified to this at trial. According to the plaintiff, Michelin was required to design its tire not just to withstand overinflation or mismatching, but mismatching and overinflation *together*.

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[4]The mismatch phenomena is so unusual that the DOT has declined to supplement Standard 119 to address it further. *See* 55 Fed. Reg. 32929 (Aug. 13, 1990); 56 Fed. Reg. 41815 (Aug. 23, 1991) ("there is little evidence of injuries or fatalities attributable to tire and rim mismatch . . . .").

[5]The bead wires are two hoop-shaped bundles of metal wire embedded in the inner edges of the tire that hold the inflated tire flush against the rim flange and anchor the various tire components.

Michelin proved that its "cable" bead wire design was viewed as being superior in the tire industry. [T. at 1047] According to Michelin's tire expert, increasing the strength of the bead wire to meet the petitioner's requirements is *not* necessarily desirable from the viewpoint of handling and overall safety. [T. at 1098-99] A tire that is mismatched and overinflated will sustain invisible damage to other critical components, notwithstanding that the bead wire may hold together. Such a damaged tire may fail suddenly during use, causing an accident. [T. at 1175-78] Preventing a bead wire failure during mounting (which will not cause injury if the tire/rim combination is properly secured or shielded) at the cost of running the risk of operational tire blowouts (which may very well cause injury) does nothing more than trade one risk for another, potentially greater risk.

Although the petitioner proved that it was "possible" to make a bead wire stronger, the petitioner never showed that doing so would create a tire of greater overall safety, as required by Alabama law. For example, the plaintiff did not call a single tire expert to testify that Michelin's bead wire design was defective, what an alternative design should have been, or how an alternative design would have improved the tire's overall safety. As the Eleventh Circuit correctly pointed out, none of the evidence cited by the petitioner addressed the question of overall safety. To the contrary, the evidence merely addressed the preliminary issue of whether it was feasible to build any alternative design, safer or not. 21 F.3d at 1056-57 n. at 17.[6] In the complete absence of any evidence

[6] On the subject of alternative designs, the petitioner cites to nonexistent evidence. At page 7 of the Petition, the petitioner alludes to a supposed design for a bead wire which could withstand inflated pressures in excess of 200 psi even when mismatched. However, this evidence was excluded for the purpose of showing a safer, alternative design. [T. at 790-93] Similarly, the "evidence" cited by the petitioner at page 8, n.8 that Goodyear was supposedly using alternative feasible technology was also specifically excluded. [Pretrial T. at 68-70; T. at 447-51, 677-78, 744-47]

showing that an alternative design would be of greater safety than the design at issue, the Eleventh Circuit correctly concluded that the elements of a design defect claim had not been proved.

E. The Petitioner's Warning Claim.

The petitioner also claimed that the reason for Mr. Richards' injury was not his multiple violations of basic tire mounting rules, but was instead Michelin's failure to put a warning on the tire sidewall more detailed than the statement which already existed, "MOUNT ONLY ON APPROVED 16-INCH RIMS." The petitioner said that Michelin should have embossed on its sidewall a picture and a special 42-word warning about tire-rim mismatches. [Def. Ex. 125]

To support this claim, the petitioner first pointed out that in 1982, Ford Motor Company wrote to its tire suppliers, including Michelin, and asked that a sidewall warning addressing tire-rim mismatches be placed on the tires it bought. [T. at 158-61; Pltf. Ex. 39A-L] The Michelin Product Safety Group, however, had always concluded that a tire sidewall warning is not a practical or effective way to communicate to tire mounters and users all the detailed information necessary to adequately teach proper tire handling and use. [T. at 1105] Accordingly, before Ford's request, neither Michelin nor any other tire manufacturer ever singled out the relatively rare hazard of tire-rim mismatches and placed on its tire sidewalls a special warning addressing it. Instead, Michelin and other manufacturers continued to rely upon the proper training of potential tire mounters and the extensive dissemination of tire-rim matching information by other methods, discussed above.

In response to Ford's 1982 request, Michelin advised Ford that, based on its experience and other factors, the tire itself was not an effective way of communicating with potential tire mounters. [T. at 166-67, 228; Pltf. Ex. 39A-L] However, because Ford insisted that some language be placed on the tires as a condition of sale, Michelin agreed to mold onto its tire sidewalls the statement, "MOUNT ONLY ON APPROVED 16-INCH RIMS." [T. at 194-95, 202, 228-35, 237-38, 246]

Ford agreed that Michelin's warning was entirely satisfactory and specifically *approved* Michelin's response to its request. [T. at 167-70, 798] The petitioner's implication that Ford's approval was reluctant or qualified is simply not supported by the record.

In addition to relying upon the Ford matter, the petitioner called a single "expert" in the field of "ergonomics" or "human factors" to take issue with Michelin's position that, as of 1985, on-tire warnings were not the best way to communicate with potential tire mounters. This witness, however, conceded that Michelin could reasonably have concluded in 1985 that tire sidewall warnings did not improve product safety, and admitted that he could not conclude that Michelin should have had any warning addressing mismatches on its tire sidewalls in the first place. [T. at 551-54, 577-78, 581, 608-09][7] Far from proving wrongdoing, his testimony actually supported Michelin's position.

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[7] As the Eleventh Circuit noted, this witness "conceded that at the time the tire was manufactured, there was evidence that on-product warnings did not contribute to product safety." 21 F.3d at 1058 n.20.

The petitioner did not call a single expert or lay witness in the tire industry who testified that a sidewall warning was necessary or, independent of Ford's request (with which Michelin complied), customary. There was no evidence at trial that any tire manufacturer ever placed a mismatch warning on its tire sidewalls for any reason other than Ford's unique request. There was no evidence at trial that any other tire purchaser, any tire manufacturer, any industry group, or any governmental entity ever requested or recommended that a mismatch warning be molded on to tire sidewalls.

SUMMARY OF THE ARGUMENT

The decision of the United States Court of Appeals for the Eleventh Circuit was correct, and this case meets none of the criteria of Supreme Court Rule 10.1 for granting a writ of certiorari. There is no "special and important reason" why this Court should duplicate the Eleventh Circuit's comprehensive review of a voluminous record merely to reach the same conclusions about the insufficiency of the petitioner's trial evidence.

As for the design defect claim, the Eleventh Circuit correctly quoted and applied the two-prong test articulated by the Alabama Supreme Court in *Beech v. Outboard Marine Corp.*, 584 So.2d 447 (Ala. 1991). 21 F.3d at 1056. The second prong requires proof that "the utility of the alternative design outweighed the utility of the design actually used." *Beech*, 584 So.2d at 450 (emphasis added). The petitioner is simply incorrect in claiming that this requirement is nonexistent.

No trial evidence addressed this requirement of proof of "greater overall safety." The petitioner's only evidence addressed the first prong — whether a feasible alternative design existed, regardless of its safety. The petitioner presented no evidence that any proposed alternative design

would result in a tire of greater safety, considering all applications. Michelin's evidence that its tire design was viewed as superior in the industry and that adopting the alternative design urged by the petitioner would unduly compromise the tire's operational safety was undisputed. For these reasons, the Eleventh Circuit correctly held the petitioner's evidence insufficient to establish a design defect. 21 F.3d at 1056-57.

The Eleventh Circuit applied the correct strict Alabama standard for awarding punitive damages. As the Eleventh Circuit explicitly stated, under Alabama law a defendant may be liable for punitive damages only upon proof that it, "with reckless indifference to the consequences, consciously and intentionally did some wrongful act or omitted some known duty with *knowledge* of the existing conditions and that this act or omission would likely or probably lead to the plaintiff's injury." 21 F.3d at 1057 (emphasis in original). That is the correct standard.

The trial evidence was insufficient to establish intentional, malicious, or wanton misconduct on Michelin's part. With respect to the design defect claim, as set forth above, the petitioner failed even to prove one of its necessary elements, let alone the heightened degree of culpability necessary to sustain an award of punitive damages. 21 F.3d at 1058.

The evidence on the petitioner's warning claim was similarly insufficient to establish wantonness. The Michelin tire at issue was in complete compliance with federal regulations, including those dictating the proper dissemination of "tire and rim matching information" and "tire sidewall markings." 49 C.F.R. § 571.119. The evidence showed extensive efforts by Michelin to educate tire mounters about proper tire handling and use by way of a special warning on the tire sidewall, sidewall markings of the tire size and maximum inflation pressure, the publication of information about

tire-rim matching in private industry booklets, the distribution of literature with the tire, and contributing to the ready availability in the tire industry of information about tire-rim matching.

No expert testified that Michelin's tire markings failed to comply with regulatory requirements. Moreover, the petitioner offered a "warnings" expert, who conceded that reasonable people could disagree whether a tire sidewall warning addressing tire-rim mismatches was necessary.

The trial evidence showed that Michelin complied with Ford Motor Company's request that some language be molded on the tire sidewalls addressing tire-rim mismatches. No other private or public entity ever requested or demanded a similar tire sidewall warning, and no other tire manufacturer ever placed such a warning on its tire sidewall for any reason other than Ford's unique request (with which Michelin complied).

Michelin's evidence that tire-rim mismatch injuries are extraordinarily rare (on the order of one in millions) was uncontradicted at trial. And, no evidence whatsoever showed that Michelin knew that the reason for the isolated mismatch injuries was the lack of a more specific and detailed tire sidewall marking.

For these reasons, the Eleventh Circuit correctly held that no evidence existed establishing Michelin's *knowledge* that the lack of a more detailed sidewall warning made mismatch injuries *likely*. The trial evidence, therefore, was insufficient to sustain an award of punitive damages.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit Correctly Found the Trial Evidence Insufficient on the Petitioner's Design Defect Claim

A. The Eleventh Circuit Applied the Correct Standard.

Contrary to the petitioner's assertion, the Eleventh Circuit correctly applied the two-prong test articulated by the Alabama Supreme Court in *Beech v. Outboard Marine Corp.*, 584 So.2d 447 (Ala. 1991), for design defect cases. The Eleventh Circuit quoted the pertinent language of the *Beech* decision and plainly set forth the two prongs. 21 F.3d at 1056. The second prong requires proof that "the utility of the alternative design outweighed the utility of the design actually used." *Beech*, 584 So.2d at 450 (emphasis added).[8] That is the requirement of proof of "greater overall safety." 21 F.3d at 1056.

B. No Evidence Existed Addressing the Issue of Greater Overall Safety.

Although the petitioner's evidence arguably addressed the first prong (the existence of a feasible design which would have prevented the injuries in question), no evidence whatsoever addressed the second prong. As set forth above, the "evidence" cited by the petitioner in his certiorari application relating to Goodyear tires was specifically excluded on this issue. [Pretrial T. at 68-70, T. at 447-51, 677-78, 744-47] And, the reference to a Michelin alternative design simply

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[8] When addressing *Beech*, the petitioner omits the word "outweighed" in quoting the second prong, thus enabling the petitioner to assert (incorrectly) that *Beech* merely requires juries to "weigh" the relative utilities. Petition at 23. To the contrary, *Beech* establishes the need for some evidence showing that the utility of the proposed alternative design "*out*weighs" that of the original design. *Beech*, 584 So.2d at 450.

referred to an alternative bead wire technology; no evidence showed that employing this technology in the tire at issue would have resulted in a tire of greater safety, considering all applications. For these reasons, the Eleventh Circuit correctly held the petitioner's evidence insufficient to establish a design defect. 21 F.3d at 1056-57.

II. The Eleventh Circuit Correctly Found the Trial Evidence Insufficient to Establish Intentional, Malicious, or Wanton Misconduct

A. The Eleventh Circuit Applied the Correct Standard.

The Eleventh Circuit did not, as the petitioner charges, "substitute [its] own philosophical preferences" or "ignore controlling law" in order to reach a "result-driven" decision. Petition at 15, 13, 22 n.16. To the contrary, the Eleventh Circuit quoted and applied the correct Alabama standard for awards of punitive damages and cited controlling Alabama authorities:

> To be guilty of wantonness, the plaintiff must show that a defendant, with reckless indifference to the consequences, consciously and intentionally did some wrongful act or omitted some known duty with knowledge of the existing conditions and that this act or omission would likely or probably lead to the plaintiff's injury. . . . Wantonness requires "knowledge that an act or failure to act does not merely increase the risk of injury, but that the act makes injury 'likely' or 'probable'."

21 F.3d at 1057 (emphasis in original) (various citations omitted) (quoting *Toole v. McClintock*, 999 F.2d 1430, 1435 (11th Cir. 1993)). This is the same standard which the petitioner cites. Petition at 20.

The petitioner has simply claimed, disingenuously, that the Eleventh Circuit's analysis of certain specific evidence was its sole legal standard. For example, the Eleventh Circuit properly considered the extraordinary statistical rarity of mismatch injuries as a factor in evaluating whether Michelin ignored an intolerable, pervasive problem. The petitioner twists this to say that the Eleventh Circuit substituted a "statistical probability" test for the correct wantonness standard the Eleventh Circuit itself cited. Petition at 19-22. Similarly, the Eleventh Circuit correctly considered Michelin's extensive efforts to disseminate information about tire-rim matching by several methods, including the tire sidewall. The petitioner stretches this to say that the Eleventh Circuit actually employed yet another standard, a "taking some steps to warn" rule. Petition at 16-19. Needless to say, it was entirely appropriate (and, indeed, incumbent upon) the Eleventh Circuit to analyze the trial evidence. The petitioner's claim that, by doing so, the Court substituted two different legal standards for the law the Eleventh Circuit itself recited is unjustified.

B. The Trial Evidence was Insufficient to Establish Intentional, Malicious, or Wanton Misconduct.

The evidence of design defect was wholly insufficient to establish intentional, malicious, or wanton misconduct on Michelin's part. As set forth above, the petitioner failed even to prove the elements of a design defect claim, let alone the heightened degree of culpability necessary to sustain an award of punitive damages. This was the appropriate analysis of the Eleventh Circuit. 21 F.3d at 1058.

The Eleventh Circuit also correctly analyzed the evidence on the petitioner's warning claim. That analysis was entirely consistent with Alabama law and with federal authorities interpreting Alabama law.

The petitioner first argues that, simply because four other mismatch claims existed (out of multiple millions of Michelin tires mounted and remounted), the evidence was automatically sufficient to establish wantonness. The Alabama courts have never held that any evidence of a prior claim automatically creates the potential for punitive exposure. To the contrary, logic and precedent dictate that evidence of prior notice may or may not be sufficient evidence of wantonness, depending on circumstances such as what the notice is, what the defendant knew about the cause of the prior incidents, and the rarity of the prior incidents. *Compare, e.g., Benford v. Richards Medical Co.*, 792 F.2d 1537 (11th Cir. 1986) (notice insufficient to prove wantonness) with *Brown v. Turner*, 497 So.2d 1119 (Ala. 1986) (notice sufficient). As correctly pointed out by the Eleventh Circuit, Alabama law requires proof that the defendant knew that its failure to do some act would likely result in injury. *Salter v. Westra*, 904 F.2d 1517, 1525 (11th Cir. 1990); *accord Grave v. Wildsmith*, 177 So.2d 448, 452 (Ala. 1965). Here, no evidence whatsoever showed that Michelin knew that the rare mismatch injuries were caused by the lack of a more detailed sidewall warning. And, the evidence plainly showed the extraordinary rarity of mismatch injuries, on the order of one in millions, which hardly rises to the level of "likelihood."

Moreover, the record was replete with evidence establishing Michelin's good faith. As set forth previously, the Michelin tire at issue was in complete compliance with Standard 119, including that regulation's dictates regarding "tire and rim matching information" and "tire sidewall markings." The evidence showed Michelin's extensive efforts to educate tire mounters about proper tire handling and use. Moreover, the tire at issue had embossed on its sidewall a specific warning addressed to the exact subject matter of this

case: "MOUNT ONLY ON APPROVED 16-INCH RIMS." And, the evidence showed extraordinary product misuse on a nearly unprecedented scale.

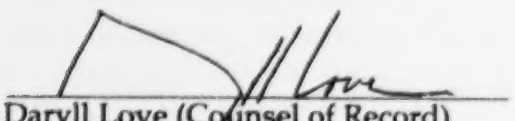
The petitioner wrongly exalts the decision in *Sears Roebuck & Co. v. Harris*, 630 So.2d 1018 (Ala. 1993). As the Eleventh Circuit correctly pointed out, this decision is "easily distinguishable" on its facts. 21 F.3d at 1059 n.23. *Sears* involved all of the following additional evidence, none of which was present in this case: (1) expert testimony that the defendant violated a published industry standard, (2) the complete lack of any permanent on-product warning addressing the danger at issue, and (3) a product specifically designed for installing by an untrained consumer (as opposed to a trained tire mounter). In addition, Sears did not involve any evidence of compliance with specific governmental regulations addressing the danger at issue, did not involve effort in excess of those stated to be "sufficient" by governmental rules, and did not involve any evidence of the extraordinary rarity of injuries resulting from the alleged danger.

For these reasons, the Eleventh Circuit correctly held that the trial evidence was insufficient to establish intentional, malicious, or wanton misconduct on Michelin's part.

CONCLUSION

For the reasons set forth above, this case meets none of the criteria of Supreme Court Rule 10.1 for granting writs of certiorari. There is no "special and important reason" for this Court to duplicate the task of reviewing the voluminous record in this case merely to reach the same conclusions as the Eleventh Circuit. The petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all interested parties to this action with a copy of Respondent's Brief in Opposition by depositing a copy of same in the United States Mail, in a properly addressed envelope with adequate postage affixed thereon to:

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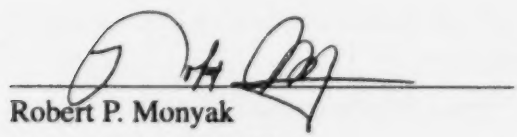
This 15th day of December, 1994.



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APPENDIX

§ 571.119 Standard No. 119; New pneumatic tires for vehicles other than passenger cars.

S1. Scope. This standard establishes performance and marking requirements for tires for use on multipurpose, passenger vehicles, trucks, buses, trailers, and motorcycles.

S2. Purpose. The purpose of this standard is to provide safe operational performance levels for tires used on motor vehicles other than passenger cars, and to place sufficient information on the tires to permit their proper selection and use.

S3. Application. This standard applies to new pneumatic tires designed for highway use on multipurpose passenger vehicles, trucks, buses, trailers, and motorcycles manufactured after 1948.

S4. Definitions. All terms defined in the Act and the rules and standards issued under its authority are used as defined therein.

"Light truck tire" means a tire designated by its manufacturer as primarily intended for use on lightweight trucks or multipurpose passenger vehicles.

"Model rim assembly" means a test device that (a) includes a rim which confirms to the published dimensions of a commercially available rim, (b) includes an air valve assembly when used for testing tubeless tires or an innertube and flap (as required) when used for testing tubetype tires, and (c) undergoes no permanent rim deformation and allows no loss of air through the portion that it comprises of the tire-rim pressure chamber when a tire is properly mounted on the assembly and subjected to the requirements of this standard.

S5. Tire and rim matching information.

S5.1 Each manufacturer of tires shall ensure that a listing of the rims that may be used with each tire that he produces is provided to the public. For purposes of this section each rim listing shall include dimensional specifications and a diagram of the rim. However a listing compiled in accordance with paragraph (a) of this section need not include dimensional specifications or a diagram of a rim if the rim's dimensional specifications and diagram are contained in each listing published in accordance with paragraph (b) of this standard. The listing shall be in one of the following forms:

(a) Listed by manufacturer name or brand name in a document furnished to dealers of the manufacturer's tires to any person upon request and in duplicate to: Tire Division, National Highway Safety Administration, 400 Seventh Street, S.W., Washington, D.C., 20590; or

(b) Contained in publications, current at the date of manufacture of the tire or any later date, of at least one of the following organizations:

The Tire and Rim Association

The European Tyre and Rim Technical Organization

Japan Automobile Tire Manufacturer's Association, Inc.

Deutche Industrie Norm

British Standards Institution

Scandanavian Tire and Rim Organization

S5.2 Information contained in a publication specified in S5.1(b) which lists general categories of tires and rims by size designation, type of construction, and/or intended use, shall be considered to be manufacturer's information pursuant to S5.1 for the listed tires, unless the publication itself or specific information provided according to S5.1(a) indicates otherwise.

S6. Requirements. Each tire shall be capable of meeting any of the applicable requirements set forth below, when mounted on a model rim assembly corresponding to any rim designated by the tire manufacturer for use with the tire in accordance with S5. However, a particular tire need not meet further requirements after having been subjected to and met the endurance test (S6.1), strength test (S6.2), or high speed performance test (S6.3).

S6.1 Endurance.

S6.1.1 Prior to testing in accordance with the procedures of S7.2, a tire shall exhibit no visual evidence or tread, sidewall, ply, cord, innerliner, or bead separation, chunking, broken cords, cracking, or open splices.

S6.1.2 When tested in accordance with tire procedures of S7.2:

(a) There shall be no visual evidence of tread, sidewall, ply, cord, innerliner, or bead separation, chunking, broken cords, cracking, or open splices.

(b) The tire pressure at the end of the test shall be not less than the initial pressure specified in S7.2(a).

S6.2 Strength. When tested in accordance with the procedures of S7.3, a tire's average breaking energy value shall be not less than the tire specified in Table II for that tire's size

and load range.

S6.3 High speed performance. When tested in accordance with the procedures of S7.4, a tire shall meet the requirements set forth in S6.1.1 and S6.1.2(a) and (b). However, this requirement applies only to motorcycle tires and to non-speed-restricted tires of 14.5-in nominal rim diameter or less marked load range A, B, C, or D.

S6.4 Treadwear indicators. Except as specified below, each tire shall have at least six treadwear indicators spaced approximately equally around the circumference of the tire that enable a person inspecting the tire to determine visually whether the tire has worn to a tread depth of one-sixteenth of an inch. Tires with 12-inch or smaller rim diameter shall have at least three such indicators which permit visual determination that the tire has worn to a tread depth of one-thirty-second of an inch.

S6.5 Tire markings. Except as specified below, each tire shall be marked on each sidewall with the information specified in paragraphs (a) through (j) of this section. The markings shall be placed between the maximum section width (exclusive of sidewall decorations or curb ribs) and the bead on at least one sidewall, unless the maximum section width of the tire is located in an area which is not more than one-fourth of the distance from the bead to the shoulder of the tire. If the maximum section width falls within that area, the markings shall appear between the bead and a point one-half the distance from the bead to the shoulder of the tire, on at least one sidewall. The markings shall be in letters and numerals not less than 0.078 inch high and raised above or sunk below the tire surface not less than 0.015 inch, except that the marking depth shall be not less than 0.010 inch in the case of motorcycle tires. The tire identification and the DOT

symbol labeling shall comply with Part 574 of this chapter. Markings may appear on only one sidewall and the entire sidewall area may be used in the case of motorcycle tires and recreational, oat, baggage, and special trailer tires.

(a) The symbol DOT, which shall constitute a certification that the tire conforms to applicable Federal motor vehicle safety standards. This symbol may be marked on only one sidewall.

(b) The tire identification number required by Part 574 of this chapter. This number may be marked on only one sidewall.

(c) The tire size designation as listed in the documents and publications designated in S5.1.

(d) The maximum load rating and corresponding inflation pressure of the tire, shown as follows:

(Mark on tires rated for single and dual load):

Max load single — lbs. at — psi cold.

Max load dual — lbs. at — psi cold.

(Mark on tires rated only for single load:)

Max load — lbs. at — psi cold.

(e) The speed restriction of the tire, if 55 mi/h or less, shown as follows:

Max speed — mph.

(f) The actual number of piles and the composition of the ply cord material in the sidewall, aid, if different, in the tread area.

(g) The words "tubeless" or "tube type" as applicable.

(h) The word "regroovable" if the tire is designed for

regrooving.

(i) The word "radial" if a radial tire.

(j) The letter designating the tire load range.

S6.6 Maximum load rating. If the maximum load rating for a particular tire size is shown in one or more of the publications described in S5.1(b), each tire of that size designation shall have a maximum load rating that is not less than the published maximum load rating, or if there are differing published ratings for the same tire size designation, not less than the lowest published maximum load rating for the size designation.

S7. Test procedures.

S7.1 General conditions.

S7.1.1 The tests are performed using an appropriate new tube, tube valve and flap assembly (as required 0 that allows no loss of air for testing of tube-type tires under S7.2, S7.3, and S7.4, and tubeless tires under S7.3.

S7.1.2 The tire must be capable of meeting the requirements of S7.2 and S7.4 when conditioned to a temperature of 95° F for 3 hours before the test is conduced, and with an ambient temperature maintained at 95° F during all phases of testing. The tire must be capable of meeting the requirements of S7.3 when conditioned at a temperature of 70° F for 3 hours before the test is conducted.

S7.2 Endurance. (a) Mount the tire on a model rim assembly and inflate it to the inflation pressure, corresponding to the maximum load rating marked on the time. Use single maximum load value when the tire is marked with both single and dual maximum load.

(b) After conditioning the tire-rim assembly in accordance with S7.1.2, adjust the tire pressure to that specified in (a) immediately before mounting the tire rim assembly.

(c) Mount the tire-rim assembly on an axle and press it against a flat faced steel test wheel that is 67.23 inches in diameter and at least as wide as the tread of the tire.

(d) Apply the test load and rotate the test wheel as indicated in Table III for the type of tire tested conducting each successive phase of the test without interruption.

(e) Immediately after running the tire the required time, measure the tire inflation pressure. Remove the tire from the model rim assembly, and inspect the tire.

S7.3 Strength. (a) Mount the tire on a model rim assembly and inflate it to the pressure corresponding to the maximum load, or maximum dual load where there is both a single and dual load marked on the tire. The tire is tubeless, a tube may be inserted to prevent loss of air during the test in the event of puncture.

(b) After conditioning the tire-rim assembly in accordance with S7.1.2, adjust the tire pressure to that specified in (a).

(c) Force a cylindrical steel plunger, with a hemispherical end and of the diameter specified in Table I for the tire size, perpendicularly into a raised tread element as near as possible to the centerline of the tread, at a rate of 2 inches per minute, until the tire breaks or the plunger is stopped by the rim.

(d) Record the force and the distance of penetration just before the tire breaks, or if it fails to break, just before the plunger is stopped by the rim.

(e) Repeat the plunger application at 72° intervals around the circumference of the tire, until five measurements are made. However, in the case of tires of 12-in rim diameter or less, repeat the plunger application at 120° intervals around the circumference of the tire, until three measurements are made.

(f) Compute the breaking energy for each test point by the following formula:

$W=(FP/2)$

where:

W = Breaking energy.

F = Force in pounds, and

P = Penetration in inches.

(g) Determine the average breaking energy value for the tire by computing the average of the values obtained in accordance with paragraph (f).

S7.4 High speed performance. (a) Perform steps (a) through (c) of S7.2.

(b) Apply a force of 88 percent of the maximum load rating marked on the tire (use single maximum load value when the tire is marked with both single and dual maximum loads), and rotate the test wheel at 250 rpm for 2 hours.

(c) Remove the load, allow the tire to cool to 95° F., and then adjust the pressure to that marked on the tire for single tire use.

(d) Reapply the same load, and without interruption or readjustment of inflation pressure, rotate the test wheel at 375 rpm for 30 minutes, then at 400 rpm for 30 minutes, and then at 425 rpm for 30 minutes.

(e) Immediately after running the tire the required time, measure the tire inflation pressure. Remove the tire from the model rim assembly, and inspect the tire.

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(3)

No. 94-906

In The

Supreme Court of the United States

October Term, 1994

JOHN RICHARDS, as Conservator and Guardian of Leonard Richards,

Petitioner,

versus

MICHELIN TIRE CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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I. THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THIS PETITION

There are "special and important reasons" to grant this petition. Under Supreme Court Rule 10.1, a special and important reason arises when a court of appeals "depart[s] from the accepted and usual course of judicial proceedings, . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a). In the present case, the Eleventh Circuit "departed from the accepted and usual course of judicial proceedings" when it supplanted well-established Alabama law with its own philosophy towards punitive damages in violation of the *Erie* doctrine.[1] This Court should seize this opportunity to remind courts of appeals that they are duty-bound to comply with the *Erie* doctrine; otherwise, they may freely

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[1] Commentators have criticized the Eleventh Circuit for ignoring other precedential authority from this Court. William C. Porth and Robert P. George in *Trimming The Ivy: A Bicentennial Re-Examination of the Establishment Clause*, 90 W. Va. L. Rev. 109 (1987), criticized the Eleventh Circuit for distorting the second prong of the *Lemon* test:

> "The Eleventh Circuit's opinion, in short, is intellectually shoddy. It distorts the very test (the second prong of *Lemon*) which it purports to apply. Then, in performing the application, it falls miserably short of the principled neutrality which it earnestly invokes. For those who find satisfaction in speculating on the philosophical motives that inspire ***result-oriented judges*** . . . , the opinion of the Eleventh Circuit should be a fertile object of study."

Id. (emphasis added).

disregard state substantive law without fear of reproval.[2]

Importantly, respondent characterizes Alabama law regarding wantonness as if it were unsettled and subject to debate. This characterization is groundless. At the time of the Eleventh Circuit's decision, Alabama law regarding wantonness was *well-settled*. Unfortunately, Alabama's substantive law did not meet the Eleventh Circuit's vision of what Alabama's law *should* be. Consequently, it created its own version of wantonness in Alabama. This refusal to apply controlling state substantive law violated the *Erie* doctrine. Therefore, this Court should exercise its supervisory power in order to remind the Eleventh Circuit, and other courts of appeals, of its duty under *Erie*.

II. *SEARS* CONTROLS THE OUTCOME OF THIS PETITION

The Alabama Supreme Court's decision in *Sears & Roebuck Co. v. Harris*, 630 So. 2d 1018 (Ala. 1994), controls this petition. Respondent claims that *Sears* is "easily distinguishable" because of "additional evidence, none of which was present in this case." Brf. at 20. Although Mr. Richards will specifically address the "additional facts" which respondent alleges make *Sears* "easily distinguishable," it is important to note that when the Alabama Supreme Court listed the evidence which it determined sufficient to meet Alabama's standard of wantonness it

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[2] While his criticism was not limited to diversity cases, another commentator notes that courts of appeals have *improperly* reversed jury verdicts in *numerous cases*. *See* Eric Schnapper, *Judges Against Juries – Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237.

enumerated only the facts which Mr. Richards included in his petition. *Compare Sears*, 630 So. 2d at 1032 *with* Pet. at 10 & 18. Specifically, the *Sears* court stated:

> "The evidence introduced by the plaintiffs to prove wantonness, however, belies the defendants' contentions. ***The plaintiffs presented evidence that*** **the dangers of carbon monoxide poisoning from gas appliances had been** *generally known in the industry* at the time the water heater was designed; that [defendants] had designed, manufactured, marketed, and distributed the . . . water heater to be installed by consumers; that ***[defendants] were actually aware that consumers were misinstalling gas water heaters*** by connecting them to LP gas and by failing to vent them properly; that ***[defendants] were actually aware that such improper installation had caused deaths*** and injuries from carbon monoxide poisoning; that ***a wrongful death action*** based on carbon monoxide poisoning caused by connection of a Kenmore II gas water heater to LP gas ***had been filed against [defendants] in 1981***; and that notwithstanding knowledge of these facts, [defendants] did not place ***any additional warning or instruction*** labels on the water heater or otherwise alter its design."

Sears, 630 So. 2d at 1032 (emphasis added). As Mr. Richards graphically illustrated with a chart in his petition, Pet. at 18, the evidence in this case meets and exceeds the evidence submitted in *Sears*. Therefore, Mr. Richards' reliance on *Sears* is not a "wrongful exaltation" of the decision, but, rather, is a proper dependence on controlling case law.

Even if, as respondent alleges, "additional facts" were considered in *Sears*, the "additional facts" provide further support for Mr. Richards' claim. Respondent stated: "*Sears* involved all of the following additional evidence, none of which was present in this case: (1) expert testimony that the defendant violated a published industry standard, (2) the complete lack of any permanent on-product warning addressing the danger at issue, and (3) a product specifically designed for installing by an untrained consumer (as opposed to a trained tire mounter)." Brf. at 20. In attempt to distinguish *Sears* from the present case, respondent actually makes Mr. Richards' case stronger.

The fact that the defendant in *Sears* did not comply with an industry standard does not make the present case and *Sears* incompatible. In *Sears*, the Alabama Supreme Court stated:

> "Addressing the defendants' more specific contention, we note that adherence to ANSI industry standards does not, *in and of itself*, relieve a manufacturer from liability for damages based on claims of wantonness, when other evidence clearly and convincingly shows that it knew of the risk of injury and death posed by its products. *Cf., King v. National Spa & Pool Institute, Inc.*, 570 So. 2d 612 (Ala. 1990). Compliance with such industry standards does not allow a manufacturer to close its eyes to injuries caused by its products and do nothing to alter their design or to warn users."

Sears, 630 So. 2d at 1032-33 (emphasis in original). Therefore, respondent's incessant references to its compliance with Standard 119 is ***immaterial*** when it "knew of the

risk of injury and death posed by its product," but did "nothing to alter its design or to warn users."

Additionally, respondent's attempt to distinguish *Sears* by claiming that in *Sears* there was a "complete lack of any permanent on-product warning addressing the danger at issue" is wholly without merit. In fact, **both Sears** and the present case involve manufacturers who failed to provide "permanent on-product warning[s] ***addressing the danger at issue.***" In *Sears*, although the defendant instructed consumers on how to install the heater, it did not warn consumers of the possible dangers arising from improper installation or foreseeable improper use.

Identical to *Sears*, respondent's placement of the statement "MOUNT ONLY ON APPROVED 16-INCH RIMS" was merely an instruction on how to mount the tire. This statement in no way adequately apprised consumers of the dangers involved with improper mounting. Therefore, in *Sears* and the present case, both manufacturers failed to adequately apprise consumers of the dangers inherent in their products.

Respondent also contends that *Sears* is distinguishable because it involved "a product specifically designed for installing by an untrained consumer (as opposed to a trained tire mounter)." Brf. at 20. Alabama law, however, provides that the defense of misuse is not available to a manufacturer if the misuse is foreseeable. *Kelly v. M. Trigg Enterprises, Inc.*, 605 So. 2d 1185, 1192 (Ala. 1992). Therefore, even if the tire was specifically designed for "trained tire mounters," respondent must adequately apprise all *foreseeable* mounters of the dangers involved.

In fact, the evidence established that respondent knew that unsophisticated and untrained users would be changing its tires. [R8-397]. Moreover, the industry as a whole deemed this danger to be so subtle and significant that even "sophisticated" users needed graphic warnings.[3] [R8-401]. Thus, because respondent did not adequately apprise "trained" or "untrained" users of the dangers of mismatches, *Sears* controls this petition.

Because the Eleventh Circuit ignored *Sears*, this Court should grant this petition and remind the Eleventh Circuit (and the other federal courts of appeals) of their obligation under the *Erie* doctrine.

III. RESPONDENT DISTORTS ALABAMA LAW

Through careful placement of key phrases, respondent misrepresents Alabama law regarding wantonness, failure to warn, and design defect. With regard to wantonness, respondent states: "[T]he Eleventh Circuit properly considered the extraordinary statistical rarity of mismatch injuries as a factor in evaluating whether Michelin ignored an intolerable, pervasive problem." Brf. at 18. However, Alabama law does not require the number of incidences caused by a problem to be "intolerable" or "pervasive" to reach the level of wantonness. In fact, the Alabama Supreme Court has found sufficient evidence of

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[3] The evidence established that most of the 125 to 150 thousand copies of the *Tire Guide*, the industry's primary trade journal that included a graphic mismatch warning, were mailed to tire companies and retail tire stores, which generally employ only *trained* tire mounters. [R8-390-91].

wantonness ***without regard to any*** "statistical probability" of injury in a number of cases. *See Mead Coated Board, Inc. v. Dempsey*, No. 1921827, 1994 WL 154660 (Ala. April 29, 1994) (upholding a finding of wantonness based *solely* on the testimony regarding safer unloading procedures, even though defendant had *no prior knowledge* of any injuries); *Sears Roebuck Co. v. Harris*, 630 So. 2d 1018, 1033 (Ala. 1992) (upholding a finding of wantonness where defendant had only been sued *once* prior to the plaintiffs' injuries); *Savage Industries, Inc. v. Duke*, 598 So. 2d 856, 859 (Ala. 1992) (affirming a jury's finding of wantonness where the manufacturer only knew of *two* previous accidents).

Respondent also distorts Alabama's law concerning failure to warn. Respondent claims "no evidence whatsoever showed that Michelin knew that the rare mismatch injuries were caused by the lack of a more detailed sidewall warning." Brf. at 19. This assertion borders on the ridiculous. There is overwhelming evidence that respondent knew that mismatch injuries were caused by a lack of a sufficient sidewall warning. Although respondent claims the number of mismatch injuries were "rare," it reaches this conclusion by comparing the number of Michelin tire mismatch injuries which actually led to lawsuits to the total number of tires it manufactured. It is undisputed that respondent knew that numerous people had been injured by mismatches, *not just by its tires, but by numerous other manufacturers of 16-inch tires.* This was a serious problem in the industry; so serious, in fact, that the industry's primary trade journal distributed graphic warnings about mismatches and Ford *demanded* that all of its tire suppliers place warnings on the sidewalls of their

tires. Clearly, there was sufficient circumstantial evidence to show that respondent knew that the industry concluded that graphic warnings were necessary to apprise tire changers of the dangers of mismatches and that respondent consciously, intentionally, and deliberately refused to provide warnings to its users because it was afraid of creating a "dangerous legal precedent."

Lastly, respondent states that the second prong of *Beech v. Outboard Marine Corp.*, 584 So. 2d 447 (Ala. 1991), requires "proof of 'greater overall safety.' " Brf. at 13. Once again, however, respondent misstates Alabama law. The second prong of *Beech* requires the plaintiff to prove that "the utility of the alternative design outweigh[s] the utility of the design actually used." *Beech*, 584 So. 2d at 450. This test allows the jury to weigh *all* of the factors of both designs to determine which is better, but does not require the plaintiff to prove "greater overall safety." Mr. Richards met his burden under *Beech* by showing that Michelin *itself* used the alternative design in some of its higher range 16-inch tires prior to the manufacturer of the 16-inch tire in question. App. at 17a n.17.[4]

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[4] Respondent accuses Mr. Richards of improperly citing to "nonexistent evidence" to support his alternative design claim. However, the evidence respondent complains of is found in the Eleventh Circuit's opinion. *See* Pet. at 17a. n.17.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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